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In The

Supreme Court of the United States

October Term, 1979

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL L. DOUGLAS
Attorney General of Nebraska

J. KIRK BROWN
Assistant Attorney General
State of Nebraska

2115 State Capitol Building
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Attorneys for Petitioners

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

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ROBERT PARRATT and
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———o———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

———o———

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit filed in the above noted case on January 29, 1980.

———o———

I.

CITATIONS TO THE OPINIONS BELOW

The opinion of District Judge Albert G. Schatz granting the plaintiff's motion for summary judgment is un-

reported and appears as Appendix B, *infra*. The opinion of the Court of Appeals is also unreported and appears as Appendix C, *infra*.

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II.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed January 29, 1979. The petitioners' petition for rehearing to the Circuit Court of Appeals was denied on February 29, 1980. The jurisdiction of this court is invoked under 28 U. S. C. § 1254 (1).

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III.

QUESTIONS PRESENTED

1. Whether simple negligence, if proven, may form the basis of a judgment under 42 U. S. C. § 1983.

2. Where a state prisoner claims to have suffered a tortious loss of property, whether the existence of a state tort claims remedy available to that prisoner provides him with such a level of due process as to satisfy the requirements of the Fourteenth Amendment.

3. Whether certain types of property are so *de minimis* as to not be protected by the Fourteenth Amendment under 42 U. S. C. § 1983.

4. Whether this record supports a finding of negligence on the part of either defendant.

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IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 42 U. S. C. § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. Fourteenth Amendment, United States Constitution:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. Neb. Rev. Stat. § 81-8,209, et seq. (Reissue 1976), *see* Appendix E, *infra*.

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V.

STATEMENT OF THE CASE

This action was brought in the United States District Court for the District of Nebraska under 42 U. S. C. § 1983, by a prisoner of the State of Nebraska to recover the value of certain hobby materials lost while they were being stored for the prisoner (Taylor) at the Nebraska Penal and Correctional Complex (NPCC), Lincoln, Nebraska. Named as defendants were Robert F. Parratt, Warden of NPCC and Francis Lugenbill, Hobby Manager at NPCC. The materials in question here were valued at $23.50. The case was submitted to the district court upon the plaintiff's motion for summary judgment and a stipulation of facts (Appendix A).

The hobby materials were mail ordered by the prisoner in accordance with NPCC procedures. However, when the materials arrived at NPCC the plaintiff had been placed in disciplinary segregation (Adjustment Center) and was not entitled to receive them. The materials were receipted into the institution by an inmate hobby clerk and a civilian hobby counter employee. Neither the inmate hobby clerk nor the civilian employee were named as defendants in this case.

After being receipted into NPCC the materials were stored at the hobby counter until Taylor was entitled to take possession of them. When Taylor attempted to claim the goods they could not be located.

The district court, upon consideration of the stipulated set of facts (Appendix A) entered summary judgment for the plaintiff against defendants Parratt and

Lugenbill in the amount of $23.50 (Appendix B). The district court, in its Memorandum Opinion specifically held that "negligence can form the foundation for an action under section 1983" (Appendix B, p. 3). Having made that determination, the district court then entered a personal judgment against these two defendants although neither the record in this case nor the district court's opinion reflect *any* direct involvement in this matter by either defendant.

On appeal the judgment of the district court was summarily affirmed (Appendix C) and the defendants' motion for rehearing denied (Appendix D).

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VI.

REASONS FOR GRANTING WRIT

I.

The decision of the Court of Appeals is in conflict with the decisions of other Courts of Appeals on the same matter.

The Eighth Circuit Court of Appeals in this case has rendered a decision in direct conflict with decisions of other circuits. In affirming the decision of the district court the Eighth Circuit stated:

> "This is an appeal from a summary judgment granted appellee, Taylor, by the district court. The appellee brought the action under 42 U. S. C. § 1983 claiming that prison officials had violated his constitutional rights by negligently depriving him of property without due process.

> "We have thoroughly examined the record and now determine that, based upon the record and the oral arguments, the judgment of the trial court should be affirmed."

This ruling is in direct conflict with the holding of *Bonner v. Coughlin,* 517 F. 2d 1311 (7th Cir. 1975), *mod.en.banc.* 545 F. 2d 565, *cert. denied* 435 U. S. 932. That case also involved the negligently caused loss of a state prisoner's property:

> "We hold that the negligence of the guards which caused the loss of Bonner's transcript was not a State deprivation of property without due process of law under the Fourteenth Amendment nor action 'under color of state law' under section 1983." *Id.* 545 F. 2d at 567.

In reaching this conclusion the Seventh Circuit Court of Appeals noted:

> "[T]he majority of Circuits hold that mere negligence does not state a claim under Section 1983." *Id.* at 568.

The Seventh Circuit has recently reaffirmed that position in *Beard v. Mitchell,* 604 F. 2d 485 (7th Cir. 1979).

Also in 1979, the Fifth Circuit Court of Appeals reversed the position it had previously taken in *Whirl v. Kern,* 407 F. 2d 781 (5th Cir. 1969), *cert. denied* 396 U. S. 901, and held that "proof of simple negligence is not enough to pierce official immunity" in a case concerning conditions of state prisoners' confinement. *Jones v. Diamond,* 594 F. 2d 997, 1004 (5th Cir. 1979).

In the First Circuit it has also been held that officials of government cannot be held liable under § 1983 for the negligent acts of their subordinates.

> "The vast majority of those courts which have considered the issue have not held high level officials liable for failing to supervise correct and control the actions of their subordinates." *Leite v. City of Providence,* 463 F. Supp. 585, 589 (D. R. I. 1978).

This ruling is directly contrary to the conclusion reached by the district court in this case. Here two supervisors are held personally liable for the loss of a prisoner's property *solely* upon the *presumption* that they negligently supervised their subordinates.

The Second Circuit Court of Appeals has also denied recovery under § 1983, where the plaintiffs' property was allegedly taken by the negligence of the government. *O'Grady v. City of Montpelier,* 573 F. 2d 747 (2d Cir. 1978).

In the Third Circuit, on another set of facts very similar to those presented here, a state prisoner was denied recovery of damages for property loss on a simple negligence theory under § 1983. In *Thorton v. Redman,* 435 F. Supp. 876 (D. Del. 1977), property of the prisoner was properly confiscated and subsequently lost.

> "Obviously, no procedures the defendant's might have employed would have provided an absolute guarantee against excessive and illegal acts such as pilfering by subordinates. But the Constitution does not require that of them." *Id.* at 881.

In the present case, however, the Eighth Circuit has required the defendants to act as *insurers* of the property of inmates held in the institution under their control. We see no justification for grafting such a broad new basis for liability upon § 1983.

The only circuit which we have discovered which has taken a position similar to that of the Eighth Circuit is the Fourth Circuit. *McCray v. State of Maryland,* 456 F. 2d 1 (4th Cir. 1972). Thus, a clear split of authority exists among the circuits on this issue which can only be resolved by this court granting certiorari in this case.

II.

This case raises important questions of federal law which have not been resolved by this Court.

A.

May simple negligence, if proven, create liability under 42 U. S. C. § 1983?

Monroe v. Pape, 365 U. S. 167 (1960) contained the following language:

> ". . . insofar as [§ 1983] creates an action for damages, [it] must be read in light of the familiar basis of tort liability that a man is responsible for the natural consequences of his acts." *Id.* at 187.

Whether this language indicates an intent to allow recovery under § 1983 for the negligent acts of defendants has yet to be resolved.

> "The question of whether negligence gives rise to a section 1983 action is hardly novel. Various federal courts have considered the question and reached varying results. The United States Supreme Court has yet to decide the issue of whether section 1983 affords 'a remedy for negligent deprivation of constitutional rights.' *Procunier v. Navarette,* 434 U. S. 555, 566, n. 14, 98 S. Ct. 855, 862, 55 L. Ed. 2d 24 (1978)." *Leite v. City of Providence, supra,* at 589.

In *Estelle v. Gamble,* 429 U. S. 97 (1976), this Court *required* a showing of wanton, reckless or grossly negligent behavior to impose liability under § 1983 in a medical treatment case. We see no justification for imposing a broader standard of liability in cases protecting a prisoner's property than in cases where a question of his health is concerned.

In this case there is no evidence or allegation that either of the defendants (1) took the property in question; (2) intended the loss to occur or; (3) evidenced a wanton, willful or reckless disregard for its safety. There may or may not be evidence of simple negligence. We do not believe there is. But simple negligence should not be allowed to create liability under § 1983. To do so would broaden the applicability of § 1983 beyond its intended limits. It would also, as these facts evidence, turn the federal courts into small claims courts for every pack of cigarettes or pair of socks lost in every state penal institution in America. We can't imagine that Congress intended or this Court desires that result.

From the number of recent cases cited in Part I of our application this issue appears ripe for decision by this Court.

B.

Is a state prisoner provided adequate due process under the Fourteenth Amendment where the State affords him a remedy to redress the loss of property negligently caused by its agents?

The State of Nebraska provides a remedy to persons who believe they have suffered a tortious loss at

the hands of the state. Neb. Rev. Stat. § 81-8,209, et seq. (Reissue 1976). *See,* Appendix E, *infra.* Through this tort claims procedure the State of Nebraska annually hears and, where appropriate, pays claims of prisoners housed in its penal institutions. This procedure was in existence at the time of the loss here in question. The plaintiff did not choose to employ this remedy. He sought relief, instead, under § 1983 claiming he had been denied property without due process of law. The plaintiff's theory of recovery was simply negligence.

The Fourteenth Amendment provides:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

Exactly what process is due the plaintiff under these facts?

A negligent act is, by definition, unintentional. It is obvious that a state cannot establish a *pre-loss* process to remedy a loss a person might suffer as the result of the *unintentional* act of a state employee or agent. The only possible solution is a system by which the plaintiff's negligently caused loss may be remedied *after the fact.* The State of Nebraska has provided such a system. What more in the way of due process could be required?

There can be no violation of a plaintiff's Fourteenth Amendment rights if he, in fact, receives due process from the state. If the state makes available an adequate remedy, the plaintiff is provided the process he is due under the Fourteenth Amendment and no constitutional violation exists. In the absence of a constitutional violation, the federal courts have authority to order relief under § 1983.

The Second Circuit Court of Appeals reached a similar conclusion in *O'Grady v. City of Montpelier, supra*:

> "While a state statute or constitution may create the right to compensation when the grade of a road is altered, the protection thereby afforded exceeds that which is available under the Fifth and Fourteenth Amendments.
>
> ". . .
>
> "Appellants may have a right to compensation under Vermont law, but this does not necessarily mean they have been deprived of their property in the sense contemplated by the Fifth and Fourteenth Amendments." *Id.* at 750-751.

That court further indicated the existence of a state remedy for payment of just compensation might eliminate any claim of constitutional violation. *Id.* at 751-752. A similar conclusion is discussed in *Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment,* 52 IND. L. J. 257 (1976).

Certainly the question of whether state law provides an adequate remedy can be considered in a federal due process context and if those safeguards are adequate no federal intrusion is necessary. *Ingraham v. Wright,* 430 U. S. 651 (1977). Cited with approval in *Ingraham v. Wright, Id.,* is the following language from *Mathews v. Eldridge,* 424 U. S. 319, 348 (1976):

> ". . . At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost. . . ."

We believe that point has been reached here. When one balances the cost inherent in allowing state prisoners a federal as well as a state forum for the redress of allegedly tortious property losses the incalculable expense incurred certainly outweighs the benefit afforded.

C.

Property valued at $23.50 is de minimis and its loss does not invoke the protection of the Fourteenth Amendment.

The district court awarded judgment against these defendants for the value of the property lost: $23.50. This Court has recognized that there are minimal limits to the value of property to be afforded due process protection. *Fuentes v. Shevin,* 407 U. S. 67, 90, n. 21 (1972); *Sniadach v. Family Finance Corp. of Bay View,* 395 U. S. 337, 342 (1962) (Harlan, J., concurring). As we noted earlier, if some minimal value of property does not fall beyond or beneath the protection of the Fourteenth Amendment, the federal courts will become embroiled in the litigation of matters of even less consequence than the present case. Again we do not believe this was the intent of Congress or the framers of our Constitution.

Within the Eighth Circuit, prior to this decision, that court had rejected certain levels of property loss as being below the protection of the Fourteenth Amendment. *Nickens v. White,* 536 F. 2d 802 (8th Cir. 1976); *Howard v. Swenson,* 426 F. 2d 227 (8th Cir. 1970), *cert. denied* 400 U. S. 948.

III.

The manner in which the Circuit Court has proceeded in this instance allows differing standards to be employed among the various districts in the circuit. That situation requires this Court's intervention.

Neither the district court's nor the Eighth Circuit's opinions have been published in this case. The result of this action, if not corrected by this court, will be to allow one standard of liability to exist in the federal courts of Nebraska and yet another standard in other districts within the Eighth Circuit. The Eighth Circuit has silently allowed these defendants to be penalized under a standard of liability clearly rejected by other districts in that circuit. In *Harvey v. Clay County Sheriff's Department,* 473 F. Supp. 741 (W. D. Mo. 1979), that court citing *Bonner v. Coughlin, supra,* dismissed an action against prison officials stating:

> "Plaintiff's allegations amount to no more than a claim that defendant's Houston and Kent were negligent in failing to take a more active role in separating the two potential [inmate] combatants. As such, it is not cognizable in an action under § 1983." *Harvey v. Clay County Sheriff's Department, supra,* at 746.

Furthermore, the Eighth Circuit has consistently rejected a simple negligence theory of liability in medical treatment cases (*Hall v. Ashley,* 607 F. 2d 789 (7th Cir. 1979)), but now quietly imposes a broader theory of liability under property loss circumstance without explanation. We are unaware of any basis, under § 1983, for such a distinction in interpretation.

IV.

The record in this case does not establish any basis for liability in these defendants even if a negligence theory were to be adopted.

Neither the stipulation (Appendix A) upon which this decision was based nor the Memorandum Opinion (Appen-

dix B) establish the responsibilities of either of the defendants with respect to the loss in question. Neither of these documents establish what the respective responsibilities of either of these defendants were to the prisoner's property or in what manner those duties may have been breached. Even under the broadest background of tort liability the facts before the district court do not make out a case against either of these defendants.

The district court announced, and the Circuit Court affirmed this statement of the law:

> "The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in loss of personal property for Mr. Taylor, which should not go without redress." (Appendix A, p. 5.)

The Eighth Circuit has consistently rejected, at least until its ruling in this case, the proposition that the tort doctrine of respondent superior was applicable to § 1983 cases. *Sebastian v. United States,* 531 F. 2d 900 (8th Cir. 1976); *DeShields v. United States Parole Commission,* 593 F. 2d 354 (8th Cir. 1979).

If these defendants were not held liable as the "innocent masters" of negligent institutional personnel, then the defendants must have been found liable based upon some specific personal involvement in this incident, but they had none. The record reflects none. The district court points to none. The record does not establish negligence on the part of these defendants under any acceptable standard.

The record does not establish that the mail distribution system was generally defective but that it failed in

one instance. That single instance of failure cannot create liability in anyone presently before this Court.

———o———

CONCLUSION

It is our firmly held belief that the insubstantial underpinnings of the district court's decision and the quiet affirmance of that decision by the Circuit Court of Appeals reflects not a studied judgment of the law and facts in this case, but the courts' single-minded irritation with our steadfast refusal to settle this case.

We did not settle this case for two reasons. First, we did not believe the plaintiff had established or could establish adequate facts to create liability under a proper interpretation of § 1983. Second, the plaintiff, who had legal counsel throughout these proceedings, had a completely adequate remedy under state law available to him, and refused it.

This is not an isolated case. As the court noted in *Thorton v. Redman, supra,* no institution can *guarantee* the security of property held for its inmates. Yet that is what the Circuit Court of Appeals has required here. Despite the best efforts of all involved property will occasionally be lost, mislaid or stolen. Each such instance, under the rulings here appealed, could subject the warden of a state penal institution and his subordinate supervisors to personal liability for damages and attorneys fees in federal court. Such rulings do not further the legitimate purposes of § 1983. They simply tend to smother

the federal courts with litigation more appropriately and easily resolved by state courts and tort claims systems.

The impact of the issues raised here are substantial. A decision by this Court on those issues is necessary to resolve a conflict between the Circuit Courts of Appeals and to resolve important questions of federal law. We therefore urge this Court to grant our petition.

Respectfully submitted,

ROBERT PARRATT and FRANCIS LUGENBILL, Petitioners

By PAUL L. DOUGLAS
Attorney General

By J. KIRK BROWN
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Attorneys for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

STIPULATION

(Filed January 18, 1978)

COME NOW the parties hereto and hereby stipulate that the testimony of Mr. Robert Rybolt would be as follows:

1. That Robert Rybolt was the Grievance Supervisor at the Reformatory at the time of the incident alleged herein.

2. That plaintiff ordered certain hobby materials from supply houses in California and that for purposes of payment therefor two drafts or checks were issued upon plaintiff's inmate account and accompanied order.

3. That the packages described herein arrived at the Nebraska Penal Complex on or about April 15, 1975 and that said package receipts were signed on or about April 21, 1975 by Mr. Paul Geros and Mr. Chuck Kostos who were assigned to the Prison Hobby Center. At the time the packages arrived at the Institution Mr. Taylor

was in the Adjustment Center at the Nebraska Penal Complex.

4. That Mr. Taylor was in Deadlock in the Reformatory at the time he contacted Mr. Rybolt regarding said packages and that Mr. Taylor was not permitted "hobby" at that time and the packages had never been in Mr. Taylor's possession.

5. That Mr. Robert Rybolt was contacted by Mr. Taylor on numerous occasions and that Mr. Rybolt personally searched for said packages after contacting Mr. Francis Lugenbill regarding said packages and that subsequent searches did not turn up said packages.

6. That neither the packages nor the contents of same have ever been turned up.

7. Normal procedure when a package is received at the Institution addressed to an inmate at the Central Mail Room it is either that the package is delivered to the inmates cell where he signs the package receipt or the inmate is notified to pick up the package at the hobby center and to personally receipt therefor.

8. Deviations from this practice are made only in exceptional circumstances; and there is no evidence or record of there having been any exceptional circumstances with respect to the packages in question.

9. That it is not Institutional policy for one inmate to sign for another inmate's package because the package receipt is the record of the inmate's receiving the package.

10. There is no record of Mr. Taylor ever receiving said packages.

11. Over a considerable period of time plaintiff made numerous inquiries and requested assistance in tracing his packages. None of the efforts of the persons so contacted were productive of any further information regarding the disposition of said packages.

12. Other than the receipts mentioned in paragraph 3 there is no record of the disposition of the packages or the whereabouts of same.

13. That there is no record indicating personal receipt of the packages by Mr. Taylor.

BERT TAYLOR, JR., Plaintiff

By /s/ Kevin Colleran

1900 First National Bank Building
Lincoln, Nebraska 68508
(402) 477-8951

ROBERT PARRATT, et al., Defendants

By /s/ C. C. Sheldon
Assistant Attorney General

2115 State Capitol Building
Lincoln, Nebraska 68509
(402) 471-2682

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

MEMORANDUM OPINION

(Filed October 25, 1978)

This civil rights action pursuant to 42 U. S. C. § 1983 is before the Court on a motion for summary judgment by the plaintiff, Bert Taylor. The plaintiff claims that he has been denied certain property, that is, a hobby kit valued at $23.57, without due process of law. This Court has jurisdiction under 28 U. S. C. § 1343. The parties entered into a stipulation of facts which are these:

Mr. Taylor ordered a kit through the mail and paid for the order with two drafts drawn on his inmate account by the prison officials. The packages arrived at the penal complex on April 15, 1975, and were signed for by inmates assigned to the hobby center. Mr. Taylor was in the adjustment center at the time and not permitted to have such hobby materials. Normal prison policy for the receipt of mail packages is that after packages arrive in the central mail room, they are either delivered to the prisoner who signs a receipt for the package or the prisoner is notified to pick up the package

and sign a receipt for the package at that time. It is not a policy to allow other inmates to sign for packages because the receipt is the prison's record of having delivered the package to the prisoner. Deviations from these regulations occur under exceptional circumstances, but no such circumstances existed here. Mr. Taylor contacted several officials in regard to the whereabouts of his packages but no one was able to find them. Mr. Taylor has never received the packages.

Three issues are presented by the motion for summary judgment: whether negligent action by state officials can be a basis for an action under 42 U. S. C. § 1983; whether penal complex officials are immune from damage actions of this kind; and whether a property right of this sort is cognizable under Section 1983.

The first issue that must be addressed is whether the negligence of state officials can be a basis for an action for deprivation of property under Section 1983. Section 42, United States Code, Section 1983, provides in pertinent part:

> Every person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Howell v. Cataldi,* 464 F. 2d 272 (3d Cir. 1972), the court analyzed a damage action under Section 1983 in the following manner: the petition must show that the conduct was done by someone under color of law and

that the conduct subjected the complainant to a deprivation of rights secured by the Constitution. Once deprivation has been established, the proof proceeds against a background of tort liability. The court stated:

> Thus, although proof of specific intent to deprive a person of his federally protected rights is not required, there must be at least proof of the "condition usually demanded by the law for liability in an action of tort (which) is the existence of either wrongful intention or culpable negligence on the part of the defendant." Salmond, *Law of Torts,* 6th Ed. 1924 p. 11.

This "background of tort liability" was originally discussed in *Monroe v. Pape,* 365 U.S. 167 (1961):

> The word "wilfully" does not appear in Section 1979 (Section 1983). . . . Section 1979 (1983) should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

Therefore, under *Monroe* and *Howell, supra,* negligence can form the foundation for an action under Section 1983. Most actions under this section have involved personal injuries; however, the Eighth Circuit has specifically recognized actions involving a deprivation of property as cognizable under Section 1983. *See Nickens v. White,* 536 F. 2d 802 (8th Cir. 1976).

The second issue is whether the prison officials are immune from a damage action such as this. In *Procunier v. Navarette,* 46 U.S.L.W. 4144 (February 22, 1978), it was alleged that prison officials had negligently and inadvertently misapplied prison regulations which denied prisoners their constitutional rights. The prison officials defended on the basis that the officials were immune

from damage actions under Section 1983. The Court's decision supplied only qualified immunity and stated the standard as follows:

> The immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct.

The officials in *Procunier* were granted immunity because at the time the cause of action arose, there was no clearly established first amendment right protecting the mailing privileges of state prisoners. In dicta, *Procunier* established that total immunity is not available for prison officials, but the question of whether negligent conduct by prison officials could form the basis for a cause of action under Section 1983 was never reached. This court must consider other case law for direction on that question.

In *Wood v. Strickland,* 420 U.S. 308 (1975), a suit was brought against members of a Board of Education by two students who were suspended for several months for allegedly "spiking" punch with two bottles of malt liquor at a school function. The school board members raised the defense of absolute immunity from damage actions. The district court found the school board members immune; however, the circuit court reversed and reached the merits of the decision. On review by the Supreme Court, the following standards for immunity were set forth:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the ac-

> tion he took within his sphere of official responsibility would violate the constitutional rights of the students affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." (Citation omitted.) A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot be characterized as being in good faith.

The plaintiff argues that under the *Woods* analysis, the prison officials knew or reasonably should have known that their failure to follow normal procedures would result in a violation of Mr. Taylor's constitutional rights and are, therefore, not immune from suit under Section 1983. This court finds that the *Woods* analysis is applicable to actions against prison officials and that no immunity from suit exists in this situation where the defendants knew or reasonably should have known that their actions would result in a violation of Mr. Taylor's rights.

The final issue is whether the specific deprivation of property, a hobby kit, implicates due process rights. In *Nickens, supra,* the Court found that the confiscation of a mail order catalog was so deminimus that due process rights were not infringed. *See also Pitts v. Griffin,* 518 F. 2d 72 (8th Cir. 1975), involving the confiscation of a multi-frequency radio pursuant to prison regulations limiting radios to AM frequencies; *Rhodes v. Sigler,* 448 F. 2d 1237 (8th Cir. 1971), concerning a prison bill for $2.45; *Howard v. Swenson,* 426 F. 2d 277 (8th Cir. 1970), in-

volving the confiscation of several pairs of shoes. However, in the instant case, Mr. Taylor received authorization to procure the hobby kit and requested that prison personnel withdraw payment for the kit from his prison account. The hobby kit was ordered and paid for, sent to Mr. Taylor through the United States mails, and received by the prison but never delivered to Mr. Taylor. This is not a situation where prison officials confiscated contraband. The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for Mr. Taylor, which loss should not go without redress.

Accordingly, this Court finds that the plaintiff is entitled to prevail on the motion for summary judgment and to an award for damages and attorney fees under 42 U. S. C. § 1988. However, an order according to this memorandum will not be entered until such time as the parties are heard with reference to attorney fees. To that end, if the parties are unable to agree and stipulate to a fee, without prejudice to their respective rights to appeal, within ten (10) days from date hereof, they shall so notify this Court so that a hearing date may be scheduled and the matter presented to the Court for determination.

BY THE COURT:

/s/ Albert G. Schatz

Judge, United States District Court

APPENDIX C

UNITED STATES COURT OF APPEALS

For The Eighth Circuit

No. 79-1514

BERT TAYLOR, JR.,

Appellee,

vs.

ROBERT PARRATT, individually and in his official capacity as Warden of the Nebraska Penal Complex; FRANCES LUGENBILL, individually and in his official capacity as Hobby Manager of the Nebraska Penal and Correctional Complex,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

Submitted: January 15, 1980
Filed: January 29, 1980

Before ROSS and HENLEY, Circuit Judges, and PORTER, District Judge.*

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* The Honorable Donald J. Porter, United States District Judge for the District of South Dakota, sitting by designation.

PER CURIAM.

This is an appeal from a summary judgment granted appellee, Taylor, by the district court. The appellee brought the action under 42 U. S. C. § 1983 claiming that prison officials had violated his constitutional rights by negligently depriving him of property without due process.

We have thoroughly examined the record and now determine that, based upon the record and the oral arguments, the judgment of the trial court should be affirmed.

Accordingly, pursuant to Rule 14 of the Rules of this court, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(NOT TO BE PUBLISHED.)

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1979

No. 79-1514

BERT TAYLOR, JR.,

Appellee,

vs.

ROBERT PARRATT, etc., et al.,

Appellants.

Appeal from the United States District Court
for the District of Nebraska

On motion of counsel for appellants, and for good cause shown, it is now here ordered that appellants may have to and including February 22, 1980 in which to file petition for rehearing.

February 15, 1980

APPENDIX E

(p) STATE CLAIMS BOARD

81-8,209. *Tort Claims Act; purpose.* The State of Nebraska shall not be liable for the torts of its officers, agents, or employees, and no suit shall be maintained against the state or any state agency on any tort claim except to the extent, and only to the extent, provided by this act. The Legislature further declares that it is its intent

and purpose through this enactment to provide uniform procedures for the bringing of tort claims against the state, and that the procedures provided by this act shall be used to the exclusion of all others.

81-8,210. *Terms, defined.* As used in this act, unless the context otherwise requires:

(1) State agency shall include all departments, agencies, boards, bureaus, and commissions of the State of Nebraska, and corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the State of Nebraska, but shall not include corporations that are essentially private corporations. State agency shall not be construed to include any contractor with the State of Nebraska;

(2) State Claims Board shall mean the board created by section 81-8,220;

(3) Employee of the state shall mean any one or more officers or employees of the state or any state agency, and shall include duly appointed members of boards or commissions when they are acting in their official capacity. State employee shall not be construed to include any contractor with the State of Nebraska;

(4) Tort claim shall mean any claim against the State of Nebraska for money only on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state, while acting within the scope of his office or employment, under circumstances where the state, if a private person, would be liable to the claimant for such damage, loss, injury, or death, but shall

not include any claim accruing before January 1, 1970; and

(5) Award shall mean any amount determined by the State Claims Board to be payable to a claimant under section 81-8,211, or the amount of any compromise or settlement under section 81-8,218.

81-8,211. *State Claims Board; authority.* Authority is hereby conferred upon the State Claims Board, acting on behalf of the State of Nebraska and with the advice and approval of the Attorney General, to consider, ascertain, adjust, compromise, settle, determine, and allow any tort claim as defined in this act. If any tort claim is compromised, settled, or allowed in an amount of more than five thousand dollars, the unanimous approval of all members of the State Claims Board and the Attorney General shall be required, and such claims also shall be approved by the district court for Lancaster County. When approval of the district court is required, the Attorney General shall make application for such approval and shall file with the application a complete record of the action of the State Claims Board on such claim. The claimant may join in such application, and if the claimant does so the court may proceed to act on the application without further notice to either party. If the claimant does not join in the application, the court shall require actual notice to all parties before acting on the application. The court may deny the application for any legal and sufficient reason, or may direct the State Claims Board to conduct further hearings on any material issues. The fees of the clerk of the district court for filing, docketing, and indexing such application shall be five dollars.

81-8,212. *Tort claims; filing; secretary; process on Attorney General.* All tort claims under this act shall be filed with the secretary of the State Claims Board. The secretary shall immediately advise the Attorney General of the filing of any claim, and it shall be the duty of the Attorney General to cause a complete investigation to be made of all such claims. In any suit brought under this act, service of process shall be made on the Attorney General.

81-8,213. *Suit; time for filing.* No suit shall be permitted under this act unless the State Claims Board has made final disposition of the claim, except that if the board does not make final disposition of a claim within six months after the claim is made in writing to the board, the claimant may, by notice in writing, withdraw the claim from consideration of the board and begin suit under this act.

81-8,214. *District court; jurisdiction; no jury.* The district court, sitting without a jury, shall have exclusive jurisdiction to hear, determine, and render judgment on any suit or tort claim as defined in this act. Suits shall be brought in the district court of the county in which the act or omission complained of occurred, or if the act or omission occurred outside the boundaries of the State of Nebraska, in the district court for Lancaster County.

81-8,215. *Liability of state.* In all suits brought under this act, the state shall be liable in the same manner, and to the same extent as a private individual under like circumstances, except that no writ of execution shall issue against the state or any state agency, and disposition of or offer to settle any claim made under this act shall not

be competent evidence of liability of the state or any employee or amount of damages.

81-8,216. *Procedure; costs; judgment; appeal.* In all suits brought under this act, the district courts shall follow the rules of civil procedure applicable to private litigants, and costs shall be allowed in all courts to the successful claimant to the same extent as if the state was a private litigant. Judgments shall be subject to appeal to the Supreme Court in the same manner as other judgments of the district court.

81-8,217. *Judgment; effect.* Final judgment in any suit under this act shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the state whose act or omission gave rise to the claim; *Provided,* this section shall not apply if the court rules that the claim is not permitted under this act.

81-8,218. *Attorney General; attorney for state; authority.* The Attorney General shall represent the state in any suit brought under this act, and is authorized to compromise or settle any such suit, with the approval of the court in which such suit is pending.

81-8,219. *Claims exempt from act.* (1) The provisions of this act shall not apply to:

(a) Any claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or

an employee of the state, whether or not the discretion be abused;

(b) Any claim arising in respect to the assessment or collection of any tax or fee, or the detention of any goods or merchandise by any law enforcement officer;

(c) Any claim for damages caused by the imposition or establishment of a quarantine by the state, whether such quarantine relates to persons or property;

(d) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights;

(e) Any claim by an employee of the state which is covered by the Nebraska workmen's compensation law; or

(f) Any claim based on activities of the Nebraska National Guard, when such claim is cognizable under the National Guard Tort Claims Act of the United States, 32 USCA 715, or when such claim accrues as a result of active federal service or state service at the call of the Governor for quelling riots and civil disturbances.

(2) With respect to any tort claim based on the alleged insufficiency or want of repair of any highway or bridge on the state highway system, it is the intent of the Legislature to waive the state's immunity from suit and liability to the same extent that liability has been imposed upon counties pursuant to section 23-2410, and only to that extent. The Legislature further declares that judicial interpretations of section 23-2410 governing the liability of counties on December 25, 1969 also shall be con-

trolling on the liability of the state for the alleged insufficiency or want of repair of any highway or bridge. It is the further intent of the Legislature that the words insufficiency or want of repair shall refer to a spot or localized highway defect and shall not be construed to refer to the general or overall condition of a highway.

81-8,220. *State Claims Board; members; legal advisor; secretary.* The Lieutenant Governor, the State Treasurer, and the Auditor of Public Accounts shall constitute the State Claims Board. The Lieutenant Governor shall be chairman of the board, and the Attorney General shall be its legal advisor. The board shall appoint a secretary and such additional administrative personnel as it deems necessary. The members of the board shall receive no compensation for their services, except that provided by law for the offices they hold, but they shall be allowed necessary traveling expenses, in performing the duties imposed by this act.

81-8,221. *State Claims Board; rules and regulations; adopt.* The State Claims Board shall adopt such rules and regulations as are necessary to carry out the provisions of this act, pursuant to Chapter 84, article 9.

81-8,222. *Department of Justice; Claims Division; deputy attorney general; duties.* There is hereby established within the Department of Justice a Claims Division, to be headed by a deputy attorney general, appointed by and under the control of the Attorney General. The Attorney General may authorize the deputy attorney general in charge of the Claims Division to perform any of the duties imposed upon the Attorney General by this

act, and may employ other persons, firms, or corporations to investigate claims under this act.

81-8,223. *Award; acceptance; effect.* Any award made under this act and accepted by the claimant shall be final and conclusive on all officers of the State of Nebraska, except when procured by means of fraud. The acceptance by the claimant of such award shall be final and conclusive on the claimant, and shall constitute a complete release by the claimant of any claim against the state and against the employee of the state whose act or omission gave rise to the claim, by reason of the same subject matter.

81-8,224. *Award; certification; payment; review, when.* Any award to a claimant and any judgment in favor of a claimant under this act shall be certified by the Attorney General to the Director of Administrative Services, who shall promptly issue his warrant for payment of such award or judgment out of the Tort Claims Fund, if sufficient money is available in such fund; *Provided,* no portion in excess of fifty thousand dollars of any award or judgment shall be paid until such award or judgment has been reviewed by the Legislature and specific appropriation made therefor. Delivery of any warrant in satisfaction of an award or judgment shall be made only upon receipt of a written release by the claimant in a form approved by the Attorney General.

81-8,225. *Tort Claims Fund; established; amount; investment; appropriation.* There is hereby established in the state treasury a Tort Claims Fund from which all awards or judgments under this act shall be paid. This fund shall be in such amount as the Legislature shall

determine to be reasonably sufficient to meet anticipated biennial claims. When the amount of money in the Tort Claims Fund is not sufficient to pay any awards or judgments under this act, the Director of Administrative Services shall immediately advise the Legislature, and request an emergency appropriation to satisfy such awards and judgments. Any money in the Tort Claims Fund available for investment shall be invested by the state investment officer pursuant to the provisions of sections 72-1237 to 72-1259.

81-8,226. *Reports to Legislature; contents.* The secretary and the Attorney General shall report to each regular session of the Legislature all claims and judgments paid under this act. Such report shall include the name of each claimant, a statement of the amount claimed and the amount awarded, and a brief description of the claim, including the agency and program or activity under which the claim arose.

81-8,227. *Tort claim; limitation of action.* (1) Every tort claim permitted under this act shall be forever barred unless within two years after such claim accrued the claim is made in writing to the State Claims Board in the manner provided by this act. The time to begin suit under this act shall be extended for a period of six months from the date of mailing of notice to the claimant by the board as to the final disposition of the claim, or from the date of withdrawal of the claim from the board under section 81-8,213, if the time to begin suit would otherwise expire before the end of such period.

(2) If a claim is made or filed under any other law of this state and a determination is made by a state

agency or court that this act provides the exclusive remedy for the claim, the time to make a claim and begin suit under this act shall be extended for a period of six months from the date of the court order making such determination or the date of mailing of notice to the claimant of such determination by a state agency, if the time to make the claim and to begin suit under this act would otherwise expire before the end of such period. The time to begin a suit under this act may be further extended as provided in subsection (1) of this section.

(3) This section and section 25-213 shall constitute the only statutes of limitations applicable to this act.

81-8,228. *Attorney fees; expenses; allowance.* The court rendering a judgment for the claimant under this act, or the State Claims Board making an award under section 81-8,211, or the Attorney General settling a claim under section 81-8,218, shall determine and allow reasonable attorneys' fees and expenses to be paid out of but not in addition to the amount of judgment or award recovered, to the attorneys representing the claimant.

81-8,229. *Tort claims; remedy of State Claims Act; exclusive.* From and after December 25, 1969, the authority of any state agency to sue or be sued in its own name shall not be construed to authorize suits against such state agency on tort claims except as authorized in this act. The remedies provided by this act in such cases shall be exclusive.

81-8,230. *State agency; payment of claims; provisions for.* Nothing in this act shall be deemed to repeal any provision of law authorizing any state agency to consider,

ascertain, adjust, compromise, settle, determine, allow, or pay any claim other than a tort claim as defined in this act.

81-8,231. *Claim against state; liability insurance; effect.* Whenever a claim or suit against the state is covered by liability insurance, the provisions of the liability insurance policy on defense and settlement shall be applicable notwithstanding any inconsistent provisions of this act. The Attorney General and the State Claims Board shall cooperate with the insurance company.

81-8,232. *Action against employee; act or omission of employee.* Nothing in this act shall be construed to prevent the state from bringing an action for recovery from an employee of the state when the state has made payment of an award or settlement growing out of the employee's act or omission under this act.

81-8,233. *Failure of employee to report damage or loss of property, injury or death, or cooperation with Attorney General; effect.* When any employee is involved in any occurrence involving damage to or loss of property or personal injury or death, such employee as soon as practicable shall report full information on such occurrence to the head of the agency by which he is employed. The head of the agency shall furnish immediately all available information on such occurrence to the secretary of the State Claims Board. All employees shall cooperate fully with the Attorney General in the investigation of all tort claims. Failure to comply with the provisions of this section shall constitute grounds for dismissal from employment.

81-8,234. *State Claims Board; transfer of property.* All furniture, equipment, books, files, and records in the possession of and used by the Sundry Claims Board shall be transferred and delivered to the State Claims Board on January 1, 1969.

81-8,235. *Act, how cited.* Sections 81-8,209 to 81-8,235 may be cited as the State Tort Claims Act.

81-8,236. *State Claims Board; claims against Nebraska; investigation; designation.* In addition to the powers, duties, and authority with regard to tort claims imposed by sections 81-8,209 to 81-8,235, the State Claims Board also shall receive and carefully investigate (1) all other claims against the State of Nebraska for the payment of which no money has been appropriated, and (2) all requests on behalf of any department, board or commission of the state for a waiver or cancellation of money or charges when necessary for fiscal or accounting procedures. Such claims, requests and any original papers supporting the same, shall be filed with the secretary of the board, and shall be properly designated by number, name of claimant, and short title.

81-8,237. *State Claims Board; meetings; hearings; notice.* The State Claims Board shall meet at such times and places, and shall make such investigation of each claim or request referred to in section 81-8,236, as it shall determine. If the board deems a hearing to be necessary or advisable, on any claim or request so filed, it shall give to the claimant at least five days' notice, by either registered or certified mail, of the time and place of hearing.

81-8,238. *State Claims Board; secretary; powers; duties.* The State Claims Board shall, for the purposes contemplated by sections 81-8,236 to 81-8,239, have the right, power and duty to (1) administer oaths, (2) compel the attendance of witnesses and the production of books, papers and documents and issue subpoenas for such purposes, and (3) punish the disobedience of such a subpoena or subpoenas, the refusal of a witness to be sworn or testify or the failure to produce books, papers and documents, as required by such subpoena or subpoenas so issued, as contempt, in the same manner as are officers who are authorized to take depositions.

81-8,239. *State Claims Board; claims; filing; investigation; action of board; payment.* After investigation, the State Claims Board shall either approve with conditions or limitations or disapprove of each claim or request, and append to the claim or request a concise statement of the facts brought out in such investigation upon which its approval or disapproval is based. Such claim or request, together with the original papers supporting it and the appended statement, shall be filed in the office of the secretary of the board, and delivered to the chairman of the appropriate committee of the next Legislature convening after the filing of the claim or request; *Provided,* the board may direct the payment by the state agency involved of any claim approved by it not in excess of five hundred dollars when such payment is agreed to by the head of the agency involved.

Supreme Court, U. S.
FILED
DEC 3 1980
MICHAEL RODAK, JR., CLERK

No 79-1734

In The

Supreme Court of the United States

October Term, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,

Petitioner,

vs.

BERT TAYLOR, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

PAUL L. DOUGLAS
Attorney General
J. KIRK BROWN
Asst. Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2682
Counsel for Petitioners

KEVIN COLLERAN
Cline, Williams, Wright, Johnson & Oldfather
Suite 1900
First National Bank Building
Lincoln, NE 68508
(402) 474-6900
Counsel for Respondent

PETITION FOR CERTIORARI FILED MAY 1, 1980
CERTIORARI GRANTED OCTOBER 20, 1980

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ROBERT PARRATT and FRANCIS LUGENBILL,

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JOINT APPENDIX

CHRONOLOGY OF EVENTS

March 24, 1976	—	Complaint
April 4, 1976	—	Answer
October 12, 1976	—	Answers to Interrogatories by Defendants Parratt and Lugenbill
January 18, 1978	—	Stipulation Re: Testimony of Robert Rybolt
June 1, 1978	—	Plaintiff Taylor's Motion for Summary Judgment

October 25, 1978	—	Memorandum Opinion sustaining Summary Judgment
April 27, 1979	—	Judgment, U. S. District Court for the District of Nebraska
January 29, 1980	—	Opinion, U. S. Court of Appeals for the Eighth Circuit

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MEMORANDUM AND ORDER

(Filed March 24, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF NEBRASKA

CV76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

MR. ROBERT PARRATT, individually and in his official capacity as Warden of the Nebraska Penal Complex; MR. FRANCIS LUGENBILL, individually and in his official capacity as Hobby Manager of the Nebraska Penal and Correctional Complex,

Defendants.

Bert Taylor, Jr., an inmate at the Nebraska Penal and Correctional Complex, has submitted a petition for relief under the Civil Rights Act, 42 U. S. C. § 1983, accompanied by a request to proceed in forma pauperis. The plaintiff contends that various hobby materials ordered by him from a California company were received by prison officials but were not turned over to him.

This is not the first time that the plaintiff has brought this issue before the court. In an order dated October 17, 1975, I denied the plaintiff leave to proceed in forma pauperis, urging him to seek relief first through the inmate grievance procedures. The plaintiff responded that he had done so and had been unsuccessful in obtaining the relief desired. I thus proceeded to the merits of the plaintiff's claim and in my order of November 4, 1975, ruled that the plaintiff's claims were legally frivolous under 28 U. S. C. § 1915 (d). The plaintiff then filed a notice of appeal, which I construed as a motion for leave to proceed on appeal in forma pauperis. I denied this motion on December 12, 1975, ruling that the issue in the case was legally frivolous.

The plaintiff now raises this same issue again. Accordingly, I must construe this petition as a motion for relief from judgment under Rule 60 (b) (1) of the Federal Rules of Civil Procedure for "mistake, inadvertence, surprise, or neglect." The plaintiff alleges facts beyond those pleaded in his previously dismissed complaints. He states that this was not simply a matter of not being able to order the goods he desired, but rather is a case where after he had made payment for the goods out of his inmate account at the Penal Complex, the goods were received by the prison but were never turned over to him, and that since that time he has received neither the goods nor a return of his money. It would appear that a cause of action for deprivation of property without due process of law under the Fourteenth Amendment has been stated. The plaintiff's failure to plead such facts in his original pro se petition can be characterized as mistake, inadvertence, or excusable neglect under Rule 60 (b) (1).

IT HEREBY IS ORDERED:

1. That the petition will be construed as a motion for relief from judgment under Rule 60 (b) (1) of the Federal Rules of Civil Procedure and the motion is granted;

2. That the petition be filed by the clerk without the prepayment of costs and that the clerk issue a summons in the usual form and mail it and a copy of the complaint to the Attorney General of the State of Nebraska; and

3. That the defendants shall file a responsive pleading within twenty days of the receipt of the summons and complaint by the Attorney General of Nebraska.

Dated March 23, 1976.

By the Court

/s/ Hon. Warren K. Urbom
Chief Judge

COMPLAINT

(Filed March 24, 1976)

Civil Action No. 76-L-57

(Civil Rights)

Bert Taylor, Jr. 28614
Box 81248 M. S. U.
Lincoln, Nebraska 68501
In Propria Personam

IN THE UNITED STATES DISTRICT COURT
FOR THE STATE OF NEBRASKA

BERT TAYLOR, JR.,

Plaintiff,

vs.

MR. ROBERT PARRATT, individually and in his Official Capacity as Warden of the Nebraska Penal Complex; MR. FRANCIS LUGENBILL, individually and in his Official Capacity as Hobby Manager of the Nebraska Penal and Correctional Complex,

Defendants.

I. Jurisdiction

1. This is a civil action authorized by 42 U. S. C. sec. 1983 to redress the deprivation, under color of state law of rights secured by the Constitution of the United States. The Court has jurisdiction under 28 U. S. C. sec. 1343. Plaintiff seeks declaratory relief pursuant to 28 U. S. C. secs. 2201 and 2202.

II. Plaintiff

2. Plaintiff Bert Taylor, Jr. is and was at all times mentioned herein a prisoner of the State of Nebraska, in the custody of the Department of Correctional Services.

He is currently confined in the Nebraska State Reformatory for Men at Lincoln, Nebraska.

III. Defendants

3. Defendant, Mr. Robert Parratt, is the Warden of the Nebraska Penal and Correctional Complex. He is legally responsible for the operation of the Nebraska Penal and Correctional Complex and for the welfare of all the inmates of that prison.

4. Defendant Mr. Francis Lugenbill, is the Hobby Manager of the Nebraska Penal and Correctional Complex. Who at the times mentioned held said position, at said prison and was directly responsible for the operation of the Hobby Program.

5. Each defendant is sued individually and in his official capacity.

IV. Facts

1. The plaintiff wishes to let the Court know the procedure which is followed in order to order Hobby materials in the Penal Complex and/or Reformatory.

a) First the prisoner must make out an inmate check (Exhibit "C") in the amount to cover the order. Then it must be witnessesd by an Officer and then endorsed.

b) The prisoner then sends said inmate check and Interview Request (Exhibit "B") requesting that a check be issued for specified amount and sent along with order to company that order is to.

c) Said check must approved (Exhibit "C") at place marked by the numeral I. Then said check is issued.

d) When package is received at Institution a package receipt is issued (Exhibit "A"). No one according

to the rules of the Institution is to be allowed to sign this other than the party that receipt is issued to.

2. The plaintiff made out an Hobby Order, Check and Interview Request and sent same to the Accounting Office for Check to be issued payable to the Zymex Co., 900 W. Los Vallecitos, San Marcos, California 92069. This check was issued in the plaintiff's name on April 1, 1975, number of check was 62245 (Exhibit "B").

3. Plaintiff on April 8, 1975, again requested that an check be issued to Zymex for another order, the Number of this check was 62377 (Exhibit "B").

4. On April 14, 1975, the plaintiff was taken from the Reformatory to the Penal Complex where he was placed in the Adjustment Center.

5. On April 17, 1975 and April 21, 1975 packages which plaintiff order from Zymax arrived at the Institution Mail room and Package Receipts were issued for these and marked A/C for Adjustment Center. There is no Hobby done in Adjustment Center (Exhibit "A").

6. On June 2, 1975, plaintiff requested officials at the Reformatory to call the Hobby Manager at the Penal Complex and have said Hobby Manager send plaintiff's Hobby materials to Reformatory. There was no action concerning this at the Complex.

7. Plaintiff contacted his Counselor, Mr. Donald Duncan in regards to said items but he could achieve no results.

8. Plaintiff then wrote to Mr. Robert Rybolt, the Grievance Committee Supervisor, several times and had several talks with him at the Reformatory regarding the

missing packages. Mr. Rybolt investigated and made repeated inquiries but could not find said packages.

9. Plaintiff then contacted the Mail Room and was able to secure copies of the package receipts.

10. Plaintiff contacted Mr. Rybolt again and was advised that the name of the party who signed for the package of April 17, 1975, was that of Chuck Kosta. Paul Gero signed for the package of April 21, 1975. Gero was an inmate in the Penal Complex. The action of these two parties in signing for said packages was strictly in violation of the rules of the Institution.

10. The officials at said Institution permitted the plaintiff to order and pay for said Hobby materials and then after violating their own rules by allowing someone else sign for packages made no effort to reimburse the plaintiff for the money they permitted him to spend.

11. The actions of Mr. Donald Duncan, Counselor and Mr. Robert Rybolt, Grievance Supervisor, in their futile attempts, proves that plaintiff had a right to said items.

V. Legal Claims

1. The plaintiff contends that his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law.

2. The plaintiff further contends that his right to Due Process under Section 1101 of the Civil Rights Act were denied to him.

3. The plaintiff cites the case of *Lynch v. Household Finance Corp.*, 405 U. S. 538, 92 S. Ct. 1113, 31 L. Ed. 2d 424, on Deprivation of Property Rights.

Stokes v. Bruce, 94 Sup. Ct. 250. Dissenting opinion by Justice Douglas with Chief Justice concurring.

Sostre v. McGinnis, 442 F. 2d 178 (C. A. 2 1971).

Hansen v. May, 502 F. 2d 728 (9th Cir. Aug. 15, 1974).

WHEREFORE, plaintiff prays that this court enter judgment granting plaintiff:

1. A declaratory judgment that the defendants' acts, policies and practices described herein violate plaintiff's right under the United States Constitution and the Civil Rights Act.

2. Compensatory damages in the amount of $1,000.00 from defendants Mr. Robert Parratt and Mr. Francis Lugenbill and from each of them to plaintiff.

3. Punitive damages in the amount of $1,000.00 from defendant Mr. Francis Lugenbill to plaintiff.

4. A jury trial on all issues triable by jury.

5. Plaintiff's costs of the suit.

6. Such other and further relief as this court deems just, proper and equitable.

Date: March 2, 1976

Respectfully submitted,

/s/ Bert Taylor, Jr.

Box 81248 M. S. U.
Lincoln, Nebraska 68501
In Propria Personam.

(Verification omitted in printing.)

EXHIBIT "A"

NEBRASKA STATE PENITENTIARY A/C

Package To Taylor

Date 4-21-75

Package From 900 W. Los Vallecita

City

State Calif.

Contents hobby

Held Out

Signed Chuck Kosta No. 28614

NEBRASKA STATE PENITENTIARY A/C

Package To Taylor

Date 4-17-75

Package From 900 W. Los Vallecitos

City

State Calif.

Contents hobby

Held Out

Signed Gero No. 28614

EXHIBIT "B"

INTERVIEW REQUEST
(Filed January 9, 1976)
Date 1-8 1976

It is respectfully requested that I be granted an interview with Accounting Office in regards to the following matter: I was advised by my Counselor Mr. Duncan to write to you in regards to securing a small claims form.

I would also appreciate the below:

I need the Dates—Numbers and Amounts of the last 2 checks sent to Zymex before the date of April 15, 1975. I need these for the filing of the Small Claims Form.

Thank you.

Explain in detail the matter you wish to discuss

NAME Bert Taylor, Jr. NUMBER 28614
Cell Location Reformatory NA-3

Work Location Dead Lock Porter

Use back of page if more space is required
Do not write in space below

DISPOSITION

April 1, 1975	Check # 62245	11.82
April 8, 1975	Check # 62377	11.65

Sorry, I'm so late but I have had a million and one things to get done. Thanks for your patience.
Date 1-22 1976

ANSWER

(Filed April 16, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV No. 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT and FRANCIS LUGENBILL,

Defendants.

The defendants for answer to the petition herein:

1. Admit the following allegations contained in the complaint: I. 1; II. 2 and 3; IV: 1, 2, 3, 4, 5, 8, 9 and 10 (except the last sentence thereof).

2. Generally deny each and every other allegation contained in the complaint.

3. Alleged that the hobby materials referred to in the complaint were received, as alleged therein; that thereafter the packages containing said materials were transported to the reformatory unit for delivery to the plaintiff; and that said packages were in fact delivered to the plaintiff.

WHEREFORE, the defendants pray that the complaint herein be denied and dismissed.

ROBERT PARRATT and FRANCIS LUGENBILL, Defendants.

By PAUL L. DOUGLAS
Attorney General

By /s/ C. C. Sheldon
Assistant Attorney General

2115 State Capitol
Lincoln, Nebraska 68509
(402) 471-2682

Their Attorneys.

(Certificate of service omitted in printing.)

ANSWERS TO INTERROGATORIES OF ROBERT PARRATT

(Filed October 12, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

Defendant Robert Parratt answers the interrogatories of the plaintiff as follows:

1. What is your full name and address?

A. Robert F. Parratt, Nebraska Penal and Correctional Complex, Lincoln, Nebraska.

2. In what capacity were you employed at the Penal Complex in 1975?

A. Warden, Nebraska Penal and Correctional Complex.

3. Will you please state the institutional procedure followed when a package is received at the institution for an inmate.

A. When a package is received at the Complex a form is filled out reciting the name of the addressee, the name and address of the shipper, and the date of receipt. This form is filled out and signed by the person who receives delivery of the incoming package.

4. What type record is kept as to who received a package?

A. The form described in answer 3 is the only official written record.

5. Does this record show who received each package?

A. After receipt and processing packages are delivered to the addressee shown on the form above referred to. No further official record is made.

6. How?

A. The package is delivered to the addressee, as stated above.

7. Are other inmates allowed to sign for packages that do not belong to them?

A. Generally not. However, in the case of the package addressed to the plaintiff herein and received at the institution on April 17, 1975, the receipt form was filled out and signed by Paul Gero, who at the time was an authorized Hobby Center clerk.

8. Is there a set of rules and regulations which govern the procedure to be followed regarding packages?

A. There are no formal published rules specifically covering the procedure of physical delivery to the inmate addressee.

9. If the answer to the above is yes, please submit a copy of the same to the court and plaintiff.

A. Not applicable.

/s/ Robert F. Parratt, Warden, Nebraska Penal and Correctional Complex

(Notarization and certificate of service omitted in printing.)

ANSWERS TO INTERROGATORIES
OF FRANCIS LUGENBILL

(Filed October 12, 1976)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

Defendant Francis Lugenbill answers the interrogatories of the plaintiff as follows:

1. What is your full name and address?

A. Francis L. Lugenbill, 4125 J Street, Lincoln, Nebraska.

2. In what capacity were you employed at the Penal Complex From April 1 to December 31, 1976 (sic)?

A. As a storekeeper, assigned to the Hobby Center, from May, 1975, to July, 1976.

3. Will you please state what procedures were followed when a package is received for an inmate?

A. When a package is received at the Complex a form is filled out reciting the name of the addressee, the name and address of the shipper, and the date of receipt. This form is filled out and signed by the person who receives delivery of the incoming package.

4. Will you please explain how the names Chuck Kosta and Paul Gero appeared on the package receipts of the plaintiff?

A. The names of these individuals appeared on the receipt forms for two packages addressed to the plaintiff for the reason that said individuals were at the time in question assigned to duty in the Hobby Center.

5. Who is Paul Gero?

A. Paul Gero, at the time in question, was an inmate.

6. Who is Chuck Kosta?

A. Chuck Kosta (whose correct name is "Kostos"), at the time in question, was an employee.

7. Why were these parties allowed to sign for packages which did not belong to them?

A. These individuals filled out and signed the forms described in answer 3 for the reason that it was within the scope of their clerical duties in connection with the Hobby Center.

8. Is the standard institutional policy? Explain.

A. Yes.

9. Were you ever contacted by Mr. Donald Duncan, Counselor, regarding these packages?

A. Yes.

10. Were you ever contacted by Mr. Robert Rybolt, Grievance Supervisor, regarding these packages?

A. Yes.

11. Do you recall approximately how many times?

A. Not exactly; but more than once.

12. Do you recall Mr. Rybolt looking for these packages personally?

A. Yes.

13. Did you ever find them?

A. No.

/s/ Francis L. Lugenbill, Defendant

(Notary and certificate of service omitted in printing.)

MOTION FOR SUMMARY JUDGMENT

(Filed June 5, 1978)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CV 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

MR. ROBERT PARRATT, et al.,

Defendants.

COMES NOW the plaintiff, Bert Taylor, Jr., and moves the court to enter a summary judgment for the plaintiff and against the defendants, Robert Parratt and Francis Lugenbill, for the following reasons:

1. There exists no genuine issue of a material fact between the parties. FED. R. CIV. P. 56 (c).

2. The plaintiff has been deprived of a constitutionally-protected right in violation of 42 U. S. C. § 1983. The fourteenth amendment guarantees him the right not to be deprived of his property without due process of law.

3. The defendants, under color of state law, caused the deprivation of plaintiff's constitutional right by failing to enforce an institutional policy of having an inmate personally receipt for a package received at the institution. The defendants knew or should have known that their actions would result in a violation of plaintiff's constitutional right.

4. The plaintiff is therefore entitled to judgment as a matter of law. FED. R. CIV. P. 56 (c).

BERT TAYLOR, JR., Plaintiff
By /s/ Kevin Colleran
1900 First National Bank Building
Lincoln, Nebraska 68508
402/477-8951

(Certificate of service omitted in printing.)

JUDGMENT

(Filed April 27, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

This matter is before the Court in regard to an award of attorney fees and for entry of judgment in accordance with memorandum opinion entered October 25, 1978. The parties have stipulated to a reasonable attorney fee award, and accordingly

IT IS HEREBY ORDERED that the plaintiff, Bert Taylor, Jr., shall recover from the defendants upon his complaint in the amount of $23.50, plus interest as allowed by law from April 21, 1975, and taxable costs, including an attorney fee of $792.54.

By the Court:

/s/ Albert G. Shatz
Judge, United States District Court

Supreme Court, U.S.
FILED
JUL 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KEVIN COLLERAN
1900 First National Bank Building
Lincoln, Nebraska 68508
Telephone: 402/474-6900

Counsel for Respondent

I N D E X

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CASES CITED

Adrikes v. Kess & Co., 398 U.S. 144 (1969)	3
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Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976)	5, 7
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Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir. 1970), *rev'd.* 405 U.S. 1036, 92 S.Ct. 1318, 31 L.Ed.2d 557	4

STATUTES CITED

42 U.S.C. § 1983	1, 2, 3, 5, 6, 7, 8

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Bert Taylor, Jr., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the United States Court of Appeals in this case.

I.

QUESTION PRESENTED

1. Whether negligence is actionable under 42 U.S.C. § 1983.

II.

STATEMENT OF FACTS

Bert Taylor, Jr. ordered a hobby kit through the mail and paid for the order with two drafts drawn on his inmate account. The packages arrived at the penal complex about April 18, 1975, and were signed for by inmates assigned to the hobby center. Mr. Taylor was in the Adjustment Center at the time and not

permitted to have such hobby materials. Normal prison policy for the receipt of mail packages is that after packages arrived in the central mail room, they are either delivered to the prisoner who signs a receipt for the package or the prisoner is notified to pick up the package and sign a receipt for the package at that time. Prison policy required that Taylor sign for such a package as the receipt is the prison's record of having delivered the package to the prisoner. Deviations from these regulations have occurred under exceptional circumstances, but no such circumstances existed here. After leaving the Adjustment Center, Mr. Taylor contacted several prison officials in regard to the whereabouts of his packages but no one was able to find them. Mr. Taylor has never received the packages.

III.

REASONS FOR DENYING THE WRIT

A. Issues Improperly Raised

Only two of the issues set forth in the Petition for a Writ of Certiorari are properly before this Court. Only one of the Petitioners' QUESTIONS PRESENTED should be considered by the Court in deciding whether the Petition for Certiorari should be granted.

The Petitioners, in their QUESTIONS PRESENTED (Petitioners' Brief, page 2), set forth the following:

1. Whether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983.

2. Where a state prisoner claims to have suffered a tortious loss of property, whether the existence of a state tort claims remedy available to that prisoner provides him with such a level of due process as to satisfy the requirements of the Fourteenth Amendment.

3. Whether certain types of property are so *de minimis* as to not be protected by the Fourteenth Amendment under 42 U.S.C. § 1983.

4. Whether this record supports a finding of negligence on the part of either defendant.

The second question presented is raised for the first time by the Petitioners in this Court. The question of an adequate state remedy was not raised by Petitioners in either the trial court or the United States Court of Appeals for the Eighth Circuit. Consequently, the question should not be considered now. *California v. Taylor*, 353 U.S. 553, 557 n. 2 (1957); *Adrikes v. Kess & Co.*, 398 U.S. 144, 147 n. 2 (1969).

The third question of whether the property involved is *de minimis*, was raised for the first time in the United States Court of Appeals for the Eighth Circuit. It was not presented to the trial court and apparently not considered by the Court of Appeals.

To elaborate briefly on the second question (the appropriateness of the Petitioners raising the question of an adequate remedy under the Nebraska Tort Claims Act), it should be noted that this action was first filed by the Respondent some time before October 17, 1975, as Judge Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska, in his Order under date of March 24, 1976, noted:

> In an order dated October 17, 1975, I denied the plaintiff leave to proceed in forma pauperis, urging him to *seek relief first through the inmate grievance procedures. The plaintiff responded that he had done so and has been unsuccessful in obtaining the relief desire*. [sic] [Emphasis added].

Judge Urbom then ordered the pleading be filed and that the Attorney General file a responsive pleading within twenty days. *See* Appendix A *infra*. At no time did the Petitioners raise the question of whether the Nebraska Tort Claims Act provided adequate

due process protection until the filing of the Petition for Certiorari. Contrary to Petitioners' statement (Petitioners' Brief, page 15), Respondent was not represented by counsel throughout these proceedings. Counsel was not appointed for Respondent until April 19, 1977 (See Judge Schatz's order dated April 19, 1977, Appendix C), two days after the statute of limitations under the Tort Claims Act expired on Respondent's claim for one of his packages and only two days before the statute was to expire on the other (See Petitioners' Brief, Appendix E, page 20; Respondent's Appendix B). Given the usual two to three days for mail service, it is unlikely that Respondent or his attorney were aware that an order had been entered appointing counsel at the time the statute of limitations expired on both of his claims. It would be unfair to the trial court, the court of appeals, and most importantly, to the Respondent to consider this issue now.

Further, the third question (whether the property involved in this case, valued at $23.50, is *de minimis*) was raised for the first time in the court of appeals. The Court of Appeals for the Eighth Circuit apparently did not consider the question, as it was not properly before them. If one assumes the question was considered, the Court of Appeals obviously found the property involved was not *de minimis*. *Russell v. Bodner*, 489 F.2d 280 (3rd Cir. 1973); *Weddle v. Director, Patuxent Institution*, 436 F.2d 342 (4th Cir. 1970); *rev'd.* 405 U.S. 1036, 92 S.Ct. 1318, 31 L.Ed.2d 557.

Nebraska obviously felt the need to create an institution policy to protect the property of inmates, be it hobby material or other property. This policy was violated by the Petitioners, who are responsible for the enforcement of the policy. Disregard for the institution's pro edure resulted in Respondent being deprived of his property. Inmates at state institutions have

the right to expect that the policies of the institution will be followed. It is likely that in almost every instance the monetary value of inmate property coming in through the mail will be *"de minimis"* in a relative sense. Judged, however, against the inmates' standard of living, $23.50 is hardly *de minimis*. It is only through the safeguards provided by § 1983 that inmate property moving through the mail will be adequately protected.

B. Negligence As Cause of Action

The only issues properly before the Court in the Petition for Certiorari are the questions of whether negligence is actionable under 42 U.S.C. § 1983, and whether the record supports a finding of negligence. The latter question certainly is not of such significance that it deserves the consideration of the Court. *Berenyi v. Immigration Service*, 385 U.S. 630 (1967); *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271 (1949). As to the question of negligence, a split of authority does appear to exist. See, e.g., *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976); *McCray v. State of Maryland*, 456 F.2d 1 (4th Cir. 1972); *Santiago v. City of Philadelphia*, 435 F.Supp. 136 (E.D. Pa. 1977). The issue is seemingly an important one.

Respondent believes that (1) negligence is actionable under § 1983; (2) the circuits themselves seem to be in a state of flux as to how the issue ought to be resolved; and (3) the record in this case is inadequate for this Court to resolve the question of whether negligence is actionable under § 1983. Respondent asserts that an allegation of negligence should be sufficient to constitute a cause of action under 42 U.S.C. § 1983. In the case of *Monroe v. Pape*, 365 U.S. 167 (1961), this Court stated:

> The word "willfully" does not appear in § 1979 [1983]
>
> * * *
>
> Section 1979 [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

365 U.S. 167, 187 (1961).

This language suggests that negligent conduct, which causes the deprivation of a federal right can justify liability under § 1983. Additionally, § 1983 does not contain language which implies that any greater degree of culpability is required.

The District Court of the Eastern District of Pennsylvania stated in the case of *Santiago v. City of Philadelphia*, 435 F.Supp. 136 (E.D. Pa. 1977):

> Rather, § 1983 states that any person who "subjects, or causes to be subjected" another to a deprivation of a right "shall be liable." 42 U.S.C. § 1983. It does not state the defendant must willfully or intentionally cause that deprivation.

435 F.Supp. at 136.

Clearly, there are two essential elements which must be established by a plaintiff proceeding under § 1983. First, that the plaintiff has been deprived of a federally protected right. Second, that the injury was the result of state involvement which falls within the "under color" language of § 1983.

The Respondent has been deprived of his property, the hobby materials, without due process of law in this case. This right is a well-defined and fundamental right. Further, the deprivation of property took place as a result of the actions or inaction of the Petitioners acting under color of state law. Thus, the two-pronged requirement for imposing § 1983 liability has been satisfied by the Respondent. This judgment should stand.

Aside from this, the circuits themselves seem to be in a state of flux as to whether negligence constitutes a cause of action under § 1983. Although Respondent does not necessarily concur with Petitioners' analysis, Petitioners assert in their brief (page 6) that the Fifth Circuit Court of Appeals recently reversed itself. Petitioners also assert that the Court of Appeals in this case has adopted a standard different from other cases previously decided (Petitioners' Brief, page 8), by the Court of Appeals for the Eighth Circuit and different from

decisions by district courts within the Eighth Circuit. This seems to indicate that many of the circuits have yet to finally resolve the question of whether negligence does constitute a cause of action under § 1983. It seems appropriate for this Court to allow the question of negligence as a cause of action under 42 U.S.C. § 1983 to be presented and decided under additional sets of circumstances and to allow for the evolution of other rationale before attempting to resolve the question.

C. Inadequacy of Record

Finally, this case was tried upon a stipulated set of facts at the suggestion of the attorney for the Petitioners after Petitioners had repeatedly failed to respond to discovery by Respondent. (*See* Appendix D, Order of Judge Schatz dated September 19, 1977). The stipulation was agreed to, at least in part, because of representations by the attorney for Petitioners that he had checked with everyone at the penal complex involved, and still available, and no one had any idea as to what had happened to the packages. The record does not reflect whether the packages were lost, stolen, misdelivered, thrown away or the victim of a practical joke. The record does reflect that the institution's regulations, as they relate to mail, were not followed in that a fellow inmate of Respondent and one other person were allowed to receipt for Respondent's packages and that no justification existed for noncompliance with proper procedure. Many of the cases that have attempted to resolve the negligence issue under § 1983 have discussed the need, or lack of need, for culpable behavior. *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972); *Bonner v. Coughlin*, 545 F.2d 565 (7th Cir. 1976); *Leite v. City of Providence*, 463 F.Supp. 585 (D.R.I. 1978). The record in the present case does not reveal how the conduct might be characterized. The issue of whether

negligence is actionable under § 1983 is of significance and it is respectfully suggested that in order to properly consider the issue, the Court needs a more comprehensive record than is presently before it.

CONCLUSION

The judgment in this case has not made the Petitioners either an "insurer" or "guarantor" of the property of inmates. The Respondent asked permission from prison authorities to order the hobby gifts and permission was granted. He then asked that money be withdrawn from his account to pay for the materials and this was done. The policy that Petitioners did not follow in this case was obviously developed to protect inmates' property from exactly what happened here. No reason existed for their failure to comply with the regulation. Petitioners should be required to see that prison regulations are adhered to and to accept responsibility when they fail to do so; this does not make them insurers.

Respondent respectfully requests that for all of the foregoing reasons, the Petition for Certiorari be denied.

Respectfully submitted,

KEVIN COLLERAN
1900 First National Bank Building
Lincoln, Nebraska 68508
Telephone: 402/474-6900

Counsel for Respondent

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
DISTRICT OF NEBRASKA
AT _____
MAR 24 1976 - /
William L. Olson, Clerk
By _____ Deputy

BERT TAYLOR, JR.,

Plaintiff,

vs.

MR. ROBERT PARRATT, individually and in his official capacity as Warden of the Nebraska Penal Complex; MR. FRANCIS LUGENBILL, individually and in his official capacity as Hobby Manager of the Nebraska Penal and Correctional Complex,

Defendants.

MEMORANDUM AND ORDER

JUDGE SCHATZ

CV76-L-57

Bert Taylor, Jr., an inmate at the Nebraska Penal and Correctional Complex, has submitted a petition for relief under the Civil Rights Act, 42 U.S.C. § 1983, accompanied by a request to proceed in forma pauperis. The plaintiff contends that various hobby materials ordered by him from a California company were received by prison officials but were not turned over to him.

This is not the first time that the plaintiff has brought this issue before the court. 'In an order dated October 17, 1975, I denied the plaintiff leave to proceed in forma pauperis, urging him to seek relief first through the inmate grievance procedures. The plaintiff responded that he had done so and had been unsuccessful in obtaining the relief desire.' I thus proceeded to the merits of the plaintiff's claim and in my order of November 4, 1975, ruled that the plaintiff's claims were legally frivolous under 28 U.S.C. § 1915(d). The plaintiff then filed a notice of appeal, which I construed as a motion for leave to proceed on appeal in forma pauperis. I denied this motion on December 12, 1975, ruling that the issue in the case was legally frivolous.

The plaintiff now raises this same issue again. Accordingly, I must construe this petition as a motion for relief from judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure for "mistake, inadvertence, surprise, or neglect." The plaintiff alleges facts beyond those pleaded in his previously dismissed complaints. He states that this was not simply a matter of not being able to order the goods he desired, but rather is a case where after he had made payment for the goods out of his inmate account at the Penal Complex, the goods were received by the prison but were never turned over to him, and that since that time he has received neither the goods nor a return of his money. It would appear that a cause of action for deprivation of property without due process of law under the Fourteenth Amendment has been stated.

The plaintiff's failure to plead such facts in his original pro se petition can be characterized as mistake, inadvertence, or excusable neglect under Rule 60(b)(1).

IT HEREBY IS ORDERED:

1. That the petition will be construed as a motion for relief from judgment under Rule 60(b)(1) of the Federal Rules of Civil Procedure and the motion is granted;

2. That the petition be filed by the clerk without the prepayment of costs and that the clerk issue a summons in the usual form and mail it and a copy of the complaint to the Attorney General of the State of Nebraska; and

3. That the defendants shall file a responsive pleading within twenty days of the receipt of the summons and complaint by the Attorney General of Nebraska.

Dated March 23, 1976.

BY THE COURT

Chief Judge

APPENDIX B

Respondent's Original Complaint filed March 26, 1976, paragraph 10

10. Plaintiff contacted Mr Rybolt again and was advised that the name of the party who signed for the Pack- of Apnl 17, 1975, was that of Chuck Kosta. Paul Garo signed for the package of April 21, 1975. Garo was an inmate in the Penal Complex. The action of these two parties in signing for said packages was strictly in violation of the rules of the Institution.

3

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

BERT TAYLOR, JR.,

Plaintiff,

v.

MR. ROBERT PARRATT, Individually and in his Official Capacity as Warden of the Nebraska Penal and Correctional Complex, et al.,

Defendants.

CIV. 76-L-57

ORDER

FILED
DISTRICT OF NEBRASKA
AT _____ M
APR 19 1977 3:32
William L. Olson, Clerk
By _____ Deputy

This matter comes on for determination with reference to motion of plaintiff, Bert Taylor, Jr., for appointment of counsel (Filing Nos. 24 and 25) and for default judgment (Filing No. 30) and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff's motion for appointment of counsel should be and the same is hereby granted, and that Kevin Colleran, 1900 First National Bank Building, Lincoln, Nebraska, 68508, is hereby appointed as counsel for plaintiff in this cause.

IT IS FURTHER ORDERED that plaintiff's motion for default judgment be and the same is hereby overruled without prejudice.

BY THE COURT:

Albert G. Ashby

JUDGE, UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA

BERT TAYLOR, JR.,
Plaintiff,
v.
ROBERT PARRATT, et al.,
Defendants.

CIV. 76-L-57

ORDER

FILED
DISTRICT OF NEBRASKA
AT
SEP 19 1977. 39
William L. Orton, Clerk

This matter coming on for determination with reference to plaintiff's motion for default judgment (Filing No. 34) and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that said motion is hereby at this stage overruled without prejudice;

IT IS FURTHER ORDERED that, based upon the representations and suggestion of counsel for defendants, that the parties will attempt to present this matter to the Court on a written stipulation of facts and to that end, the said defendants will prepare and forward to counsel for the plaintiff a proposed written stipulation within twenty (20) days from date hereof, and counsel will then report the status of the case immediately thereafter to the Court.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT

RECEIVED
DEC 16 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S MOTION TO DISMISS THE WRIT OF CERTIORARI

Submitted by:

KEVIN COLLERAN
1900 First National Bank Building
Lincoln, Nebraska 68508
Telephone: 402/474-6900

Counsel for Respondent

10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S MOTION TO DISMISS
THE WRIT OF CERTIORARI

Respondent hereby respectfully moves that the writ of certiorari in this case be dismissed, and that the case be remanded to the United States Court of Appeals for the Eighth Circuit with instructions to remand to the United States District Court for the District of Nebraska, so that the order entered by that court, which is the subject of this case, filed on April 27, 1979, can be vacated, or in the alternative, the motion to dismiss, a copy of which is attached hereto, filed, and an order entered accordingly.

This case commenced on March 24, 1976, with the Respondent asking for compensatory damages in the amount of $23.50, with interest, along with punitive damages in the amount of $1,000 from each of the Petitioners. The claim for punitive damages was subsequently abandoned.

Respondent, at the time, was incarcerated at the Nebraska Penal and Correctional Complex. The Petitioners are, respectively, the Warden of the Nebraska Penal and Correctional Complex and the individual in charge of the hobby center from wherein the Respondent's property, valued at $23.50, disappeared.

This case was tried on a stipulated set of facts pursuant to a motion for summary judgment filed on June 5, 1978. On October 25, 1978, the court filed its Memorandum Opinion and in April of 1979, the court entered its order pursuant to that Memorandum Opinion, and from which the Petitioners herein seek relief. Said order was appealed to the United States Court of Appeals for the Eighth Circuit by the Petitioners on May 30, 1979 and the order of the United States District Court for the District of Nebraska was affirmed by the United States Court of Appeals for the Eighth Circuit on January 29, 1980. The Petitioners' petition for rehearing to the United States Court of Appeals for the Eighth Circuit was denied on February 29, 1980, and the petition for certiorari was filed on May 1, 1980, with certiorari being granted on October 20, 1980.

The relief sought by the Petitioners from this Court is the vacation or reversal of the order entered by the District Court for the District of Nebraska.

Respondent desires to consent to the vacation of the decree entered on April 27, 1979 by the United States District Court for the District of Nebraska, or, in the alternative, file a motion to dismiss the complaint with an order entered in accordance therewith, for the reason that the Respondent has been paid by a person not a party to this action all sums due and owing him under said order. While the case is in this Court, however, the trial court is without jurisdiction. Respondent submits, therefore, that this Court should dismiss the writ of certiorari and remand this case to the trial court so that the order entered therein may be vacated or the complaint dismissed.

For these reasons, Respondent suggests that the issues raised by Petitioners in this case no longer affect either of the parties, that no case or controversy is before this Court, and that the writ should be dismissed and the case remanded so that the order of the trial court can be vacated or the complaint dismissed.

Respectfully submitted,

Kevin Colleran

KEVIN COLLERAN
1900 First National Bank Building
Lincoln, Nebraska 68508
Telephone: 402/474-6900

Counsel for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1734

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ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AFFIDAVIT OF RESPONDENT

Submitted by:

KEVIN COLLERAN
1900 First National Bank Building
Lincoln, Nebraska 68508
Telephone: 402/474-6900

Counsel for Respondent

IN THE

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October Term, 1980

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

AFFIDAVIT OF RESPONDENT

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

BERT TAYLOR, JR., being first duly sworn, deposes and states as follows:

1. That I am presently incarcerated in the State of Washington.

2. That on March 24, 1976, while incarcerated in the Nebraska Penal and Correctional Complex, I filed an action in the United States District Court for the District of Nebraska based upon 42 U.S.C. § 1983 against Petitioners Robert Parratt and Francis Lugenbill, to redress the deprivation under color of state law rights secured by the Constitution of the United States; more specifically, that I was deprived of property valued at $23.50.

3. That on April 22, 1979, the United States District Court for the District of Nebraska, the Honorable Albert G. Schatz presiding, entered judgment in my favor and against the Petitioners in the amount of $23.50, plus interest as allowed by law from April 21, 1975.

4. That the Petitioners appealed the decision of the trial court to the United States Court of Appeals for the Eighth Circuit, and that on January 29, 1980, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the trial court.

5. That on May 1, 1980, the Petitioners petitioned the United States Supreme Court for an order granting certiorari and that on October 20, 1980, this Court granted Petitioners' petition.

6. That I have now received the $23.50, plus interest from April 21, 1975, as allowed by law, and that for that reason, wish to dismiss my case filed in the United States District Court for the District of Nebraska, or, in the alternative, have the order of the trial court of April 29, 1979, vacated.

7. That attached hereto is a copy of the Motion to Dismiss that I have authorized my court-appointed attorney to file in the United States District Court for the District of Nebraska.

8. That I am willing to provide the Petitioners herein a release, as attached hereto, for any and all claims I may have against them as a result of the disappearance of my hobby materials while incarcerated in the Nebraska Penal and Correctional Complex; which are the subject matters of the action I filed on March 24, 1976.

Further affiant sayeth not.

_____
Bert Taylor, Jr.

Subscribed and sworn to before me this ___ day of December, 1980.

_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BERT TAYLOR, JR., Plaintiff, vs. ROBERT PARRATT and FRANCIS LUGENBILL, Defendants.	Civil No. 76-L-57 MOTION TO DISMISS

COMES NOW the plaintiff, through his court-appointed counsel, and hereby moves the court to enter an order dismissing plaintiff's Complaint for the reason that plaintiff has been paid for his lost hobby materials, plus interest, and for that reason there no longer exists a controversy between the parties.

BERT TAYLOR, JR., Plaintiff

By_____
Kevin Colleran
1900 First National Bank Building
Lincoln, Nebraska 68508
Telephone: 402/474-6900

Court-Appointed Counsel for
Plaintiff Bert Taylor, Jr.

CERTIFICATE OF SERVICE

I, Kevin Colleran, hereby certify that a copy of the foregoing Motion to Dismiss was served upon the defendants by and through their counsel of record, J. Kirk Brown, Assistant Attorney General, State of Nebraska, 2115 State Capitol Building, Lincoln, Nebraska 68509 by United States mail, sufficient postage prepaid on this ___ day of _____, 1980.

_____
Kevin Colleran

R E L E A S E

I, BERT TAYLOR, JR., hereby completely, finally and forever release and discharge ROBERT PARRATT and FRANCIS LUGENBILL of and from any and all claims and causes of action of every name, nature and description, which I have against Robert Parratt and Francis Lugenbill as a result of the disappearance of hobby materials ordered by me while incarcerated in the Nebraska Penal and Correctional Complex.

I HAVE READ THE FOREGOING RELEASE AND UNDERSTAND IT.

Executed this ___ day of _____, 19__.

_____
Bert Taylor, Jr.

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On this ___ day of _____, 19__, before me, the undersigned, a Notary Public in and for said county and state, personally appeared Bert Taylor, Jr., who executed the above and foregoing Release and acknowledged that he had read the same, understood its contents and purposes, and executed the same as his voluntary act and deed.

WITNESS my hand and notarial seal on the day and year first above written.

_____
Notary Public

R E L E A S E

I, BERT TAYLOR, JR., hereby completely, finally and forever release and discharge ROBERT PARRATT and FRANCIS LUGENBILL of and from any and all claims and causes of action of every name, nature and description, which I have against Robert Parratt and Francis Lugenbill as a result of the disappearance of hobby materials ordered by me while incarcerated in the Nebraska Penal and Correctional Complex.

I HAVE READ THE FOREGOING RELEASE AND UNDERSTAND IT.

Executed this ___ day of _____, 19__.

_____
Bert Taylor, Jr.

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On this ___ day of _____, 19__, before me, the undersigned, a Notary Public in and for said county and state, personally appeared Bert Taylor, Jr., who executed the above and foregoing Release and acknowledged that he had read the same, understood its contents and purposes, and executed the same as his voluntary act and deed.

WITNESS my hand and notarial seal on the day and year first above written.

_____
Notary Public

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ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

I, KEVIN COLLERAN, hereby certify that a copy of the Respondent's Motion to Dismiss The Writ of Certiorari, the Affidavit of Respondent in support of the Motion to Dismiss, and the Release were served upon the Petitioners herein by mailing a true and correct copy of each document to the Honorable Paul L. Douglas, Attorney General for the State of Nebraska and J. Kirk Brown, Assistant Attorney General for the State of Nebraska, 2115 State Capitol Building, Lincoln, Nebraska 68509 by United States mail, sufficient postage prepaid on this 11th day of December, 1980.

Kevin Colleran

Kevin Colleran
Attorney for Respondent
1900 First National Bank Building
Lincoln, Nebraska 68508
Telephone: 402/474-6900

RECEIVED
DEC 27 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

PAUL L. DOUGLAS
Attorney General

J. KIRK BROWN
Assistant Attorney General
State of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Attorneys for Petitioners

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INTRODUCTION

On October 20, 1980, this Court found this case worthy of consideration and granted a Writ of Certiorari. The petitioners' brief on the merits and six amicus briefs representing the interests of 30 states and one private organization were filed with this Court on or before December 4, 1980. Within a week of these filings the respondent filed his motion to dismiss this case as moot.

The respondent alleges, and the petitioners have no present means of verifying, that he has been paid a sum of money equal to the amount of the judgment questioned in this case. The money was allegedly paid by a person "not a party to the action."[1] Petitioners can assure this Court the money in question did not come from them, anyone acting with their permission or on their behalf.

The petitioners continue in their desire to have the issues raised by their petition for certiorari resolved by this Court, and strongly urge that the respondent's motion to dismiss be denied.

ARGUMENT

I.

THIS CASE IS NOT MOOT.

A.

The facts presented by the respondent do not effect the relationship of the parties or the judgment now before this Court. At best the respondent's allegations pray this Court to provide them an <u>opportunity</u> to alter the status of this case in the future.

---

[1]The petitioners have been able to verify that the offer to pay the sum in question was extended to respondent's counsel by attorney Robert M. Mark, an associate with the law firm of Sonnenschein, Carlin, Nath and Rosenthal, Chicago, Illinois. Mr. Mark and other representatives of that firm have refused to discuss the details of the offer with petitioners' counsel but have provided conflicting information regarding whether the sum in question comes from Mr. Mark, the firm or an unnamed client of the firm.

The judgment challenged remains a potential source of liability for the petitioners, and we question the respondent's ability or authority to dismiss this matter once it has gone to judgment. In essence, the respondent alleges that he is now prepared to release the judgment against the petitioners. This would amount to a satisfaction of the judgment in question and would not effect its precedential value.

It is the law of this case, and not $23.50, which prompted the Petition for Writ of Certiorari in this case. The fact that the respondent has now found an unnamed benefactor to whom it is worth at least $23.50 to see that the issues presented here are not considered by this Court, should not obscure the fact that nothing has materially changed in this case. The relationship between the respondent and the petitioners is no different today than it was when the Writ of Certiorari was granted. The respondent is simply $23.50 richer.

The question of whether the respondent has any right under 42 U.S.C. §1983 to the judgment presently before this Court remains significant and worthy of consideration and resolution by this Court.

B.

We note the respondent cites no authority in support of his argument that the facts he alleges moot this case. We believe this lack of cited authority clearly reflects the lack of that proposition's merit.

This situation does not fall within the normal concepts of mootness which underlie this Court's Rule 53. No accord or resolution has been reached between the parties to this case, nor do the petitioners unilaterally desire this case dismissed. No party to this action is now deceased.

This case does not represent a situation mooted by the passage of time. E.g., Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976); Weinstein v. Bradford, 423 U.S. 147 (1975). It does represent a unique attempt by parties not before this Court to remove a case from the docket.

II.

In Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911), this Court first announced the proposition that questions "capable of repetition, yet evading review" should not be denied an opportunity for redress. Assuming for the moment that the respondent's allegations do present a question of mootness, we believe this case clearly raises the same public policy considerations which led to the result reached in the case above.

A.

ISSUES CAPABLE OF REPETITION

The issues in this case are clearly capable of repetition. Petitioner Parratt continues in his position as Warden of the Nebraska State Penitentiary and inmate claims for property lost or destroyed in that institution continue to arise. Not only is petitioner Parratt's exposure to liability under the reasoning of the judgment in this case capable of repetition locally, but nationally these questions continue to arise with regularity. Including this case, Writs of Certiorari have been granted on the negligence issue raised by this case three times in the last three years. Procunier v. Navarette, 434 U.S. 555 (1978); Baker v. McCollan, 443 U.S. 137 (1979). The issues presented by this case are clearly capable of repetition.

B.

ISSUES EVADING REVIEW

The issues presented by this case are also likely to evade review. One of the issues presented by this case is that the amount in controversy may be de minimus under the Fourteenth Amendment. The amounts at issue in prisoner property loss claims are generally small. See, Brief of the State of New Jersey as Amicus Curiae, p. 5.

Yet if we assume this case is moot, as argued by the respondent, it is moot solely due to the desire of a person or persons unknown to render it so. Although the motivations of these persons may be unarticulated, their goals are obvious.

They do not want this case considered and resolved by this Court. If they are successful in their attempt to buy this case off of this Court's docket, there will be nothing to prevent similar actions in the future. Their expenses were negligible. The same pressing issues could repeatedly be removed from this Court's consideration and the matter will thus effectively evade review.

III.

CONSTRUCTIVE CLASS ACTION

The petitioners are officials and employees of the State of Nebraska's prison system. As such they are constantly exposed to the possibility of being named as a defendant in actions brought pursuant to 42 U.S.C. §1983. Yet as defendants the petitioners have no means of resolving their respective rights under 42 U.S.C. §1983, regardless of the similarity of their situation to governmental defendants elsewhere, except as individuals.

This Court now has before it the amicus curiae briefs of 30 states and one private entity, all representing interests similar to those typified by the individual petitioners present here. In effect, this Court now has before it a constructive class of persons similarly situated who may practically join together only in this forum to urge the vindication of their mutually held rights and interests.

The proposition that this Court will continue to hold and review classes raising issues significant to a class regardless of the changing status of individual members of that class is well recognized. Sosna v. Iowa, 419 U.S. 393 (1974); Roe v. Wade, 410 U.S. 113 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972).

The same public policy considerations which led to the decisions in the cases noted above strongly mitigate in favor of the retention of this case upon the docket of this Court. Nowhere but in this forum may issues of the significance of those presented by this case be effectively resolved. The

split of authority among the circuit courts noted in our Petition for Writ of Certiorari as well as the interest expressed by the amicus curiae before this Court cry out for a resolution of these questions. All involved deserve an interpretation of the rights and remedies afforded by 42 U.S.C. §1983 which may be applied uniformly throughout this country.

IV.

NEED TO RESOLVE SIGNIFICANT QUESTIONS

This Court has also recognized the need (if not the necessity) of resolving pressing issues regardless of arguments that a case may be moot. Whether a case is to be removed from the docket of this Court as moot rests within the discretion of this Court. In Gilligan v. Morgan, 413 U.S. 1 (1973), the record clearly established that none of the party plaintiffs or defendants had a current interest in the issues raised by the case.

> Some basis, therefore, exists for a conclusion that the case is now moot; however, on the record before us we are not prepared to resolve the case on that basis and therefore turn to the important question whether the claims alleged in the complaint are justiciable.

Id. 413 U.S. at 5. Before this Court the practical necessities of resolving important questions should be given precedence over technical concepts of mootness. Richardson v. Ramirez, 418 U.S. 24 (1974). A heavy burden is placed upon a party seeking to moot a case before this Court to show that the issues raised are not likely to recur or the case will be retained to vindicate the "public interest in having the legality of the practice settled." United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

42 U.S.C. §1983 is uniformly applicable to all who have come forward seeking a resolution of these issues. This case is confined to a sufficiently specific factual situation that a decision here on the merits would effectively eliminate the necessity for future repetitious litigation. 42 U.S.C. §1983 represents established legislation which is not currently subject

to experimentation, change or development by either the legislative or executive branches of government. All of these factors lend weight to the conclusion that this case should be retained. Note: Mootness in the Supreme Court, 88 Harv.L.Rev. 373 (1974); Annot. 44 L.Ed.2d 719 (1976).

V.

PUBLIC POLICY CONSIDERATIONS

Finally, we believe the means employed by the respondent and his clandestine supporters raise significant issues of public policy in the administration of this Court's docket. Those persons[2] spearheading this attempt to remove this case from the docket have expressed the opinion to petitioners' counsel that this is not the kind of case this Court should be deciding. They therefore have altruistically, albeit anonymously, moved to assist in relieving this Court of that burden.

This type of thinking completely ignores the fact that this Court has already reviewed this case on the Petition for Certiorari and deemed it worthy of the time and effort necessary to review it on the merits. The respondent's allies apparently view the decision of this Court to grant certiorari as erroneous and have expressed to petitioners' counsel their further belief that delivering a check for $23.50 plus interest to respondent's counsel was the most fiscally expenditious means available to correct that error. The presumptuousness of their thinking is impressive, and if appropriate could have denied us such legally significant rulings as that in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), which involved a similarly "insignificant" sum.

This Court, the petitioners and the public should have a right to know who is attempting to influence the workings of this Court. If there are persons who believe that our Petition for Certiorari was improvidently granted or that the petitioners should not prevail on the merits they certainly are afforded

---

[2]See, footnote 1.

the opportunity to express those beliefs as amicus curiae before this Court. In that posture both the strength of their logic and the virtue of their motivations may be evaluated and debated openly. To date, both the petitioners and this Court have been denied the opportunity to make such an evaluation.

Public confidence and professional respect for this Court hinge to a great extent upon the fact that an opportunity is afforded in this forum for a full airing of divergent viewpoints as they might affect decisions which will always have significance beyond the parties directly involved. To allow the respondent to succeed on his motion to dismiss we believe would depreciate these essential values.

The question is whether this Court or unnamed third parties are to control the docket of this Court. The answer we hope will lead to the conclusion the respondent's motion should be denied.

CONCLUSION

For the reasons above we urge this Court to deny the respondent's motion to dismiss and allow this case to proceed to a resolution on its merits.

Respectfully submitted,

ROBERT PARRATT and FRANCIS LUGENGILL, Petitioners,

By PAUL L. DOUGLAS
Attorney General

By _____
J. Kirk Brown
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Members of the Bar of the
United States Supreme Court

Attorneys for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT PARRATT and FRANCIS LUGENBILL,	)	October Term, 1980
	)	
	)	No. 79-1734
Petitioners,	)	
	)	
v.	)	CERTIFICATE OF PERSONAL SERVICE
	)	
BERT TAYLOR, JR.,	)	
	)	
Respondent.	)	

I hereby certify that three copies of the Petitioners' Brief on the Merits have been served upon the respondent by mailing said copies, first class postage prepaid, addressed to the respondent's attorney, Mr. Kevin Colleran, 1900 First National Bank Building, Lincoln, Nebraska 68509, on this 24th day of December, 1980.

PAUL L. DOUGLAS
Attorney General

By _____
J. Kirk Brown
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509
Tel. (402) 471-2682

Members of the Bar of the
United States Supreme Court

Attorneys for the Petitioners

FOR ARGUMENT

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FOR THE EIGHTH CIRCUIT

RESPONDENT'S REPLY TO PETITIONERS' OPPOSITION TO MOTION TO DISMISS THE WRIT OF CERTIORARI

KEVIN COLLERAN
CLINE, WILLIAMS, WRIGHT,
JOHNSON & OLDFATHER
1900 First National Bank Bldg.
Lincoln, Nebraska 68508

Attorney for Respondent

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INTRODUCTION

On October 20, 1980, this Court granted a Writ of Certiorari. At the time the Writ was granted the controversy existing between the parties was for $23.50. This amount, the respondent alleged, was owed to him by the petitioners because their negligence caused him to lose property valued at that amount while he was incarcerated at the Nebraska Penal and Correctional Complex.

After the granting of the Writ, respondent accepted an offer from a third party (a religious organization) for payment of the entire amount in controversy. Respondent has signed an affidavit acknowledging such payment. He has also issued a release in favor of the petitioners for any and all claims or causes of action he might have arising out of the stolen or lost property. One of the primary reasons that the respondent accepted payment is that, because he has moved to the State of Washington and because of the communication problems that entails, he has lost interest in the prosecution of the suit.

ARGUMENT

I.

THIS CASE SHOULD BE DISMISSED BECAUSE THIS CASE IS MOOT, SINCE THERE IS NO CASE OR CONTROVERSY PRESENTED BY IT.

Article III, Section 2, Clause 1, of the United States Constitution establishes as a prerequisite to Federal jurisdiction in a litigated case, the existence of a "case or controversy." Id. This Court has interpreted this to mean that "federal Courts are without power to decide questions that cannot affect the rights of litigants in the case before them." DeFunis v. Odegaard, 416 U.S. 312, 316 (1974), (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971)). More specifically, in Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, reh. den. 300 U.S. 687 (1937), the Court stated that a case to be susceptible to Federal jurisdiction:

> . . . must be definite and concrete, touching the legal relations of the parties having adverse legal interests . . . . It must be a

> real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Id. at 240-241.

It is from this requirement that the doctrine of mootness is derived. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." County of L.A. v. Davis, _____ U.S. _____, 99 S.Ct. 1379, 1383 (1979), (quoting Powell v. McCormack, 395 U.S. 489, 496 (1969)). Mootness can occur because "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." Id. at _____, 99 S.Ct. at 1379 (emphasis added). "The usual rule in federal cases is . . . that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated." Roe v. Wade, 410 U.S. 113, 125 (1973).

The facts presented in DeFunis v. Odegaard, 416 U.S. 312 (1974), offer an illustration of interim relief or events causing a case to become moot. The appellant DeFunis was denied admission to the law school of the University of Washington. He brought suit in a Washington trial court alleging that the procedures and criteria employed by the law school discriminated against him on account of his race, in violation of the Equal Protection clause of the Fourteenth Amendment to the United States Constitution. Id. at 314. He sought a mandatory injunction commanding the University to admit him as a member of the first-year class. Id. The trial court found in his favor and he was admitted to law school on order of the court. Id. at 314-15. The Washington Supreme Court reversed the trial court, and Writ of Certiorari was granted by the United States Supreme Court. Id. At the time of oral argument DeFunis was in his last semester of law school. Id. at 315. The University indicated that it would allow DeFunis to complete law school, even if the Supreme Court affirmed the decision of the

Washington Supreme Court. Id. at 316. The United States Supreme Court thus held that the case was moot, since "[a] determination by this court of the legal issues tendered by the parties is no longer necessary to compel that result [the completion of law school] and it could not serve to prevent it." Id. at 317.

Another example is Sosna v. Iowa, 419 U.S. 393 (1975). In Sosna, the appellant challenged the constitutionality of Iowa's one year residency requirement for divorce. Id. at 395-96. At the time of oral argument before the Supreme Court, the appellant had satisfied the one year residency requirement, and had obtained a divorce outside of Iowa. Id. at 399. The Court in dicta stated that had appellant sued on her own behalf, the case would be moot and require dismissal. The Court was able to hear the case, however, because the case had been filed as a certified class action, Id. at 397, and although the action was moot as far as the class representative was concerned, it was not moot as far as the class itself was concerned. Id. at 399.

In this case the intervening facts that have caused it to become moot are that the amount in controversy has been paid in full to the respondent by a third party and the respondent has executed a release for any and claims and causes of action he might have arising out of the situation which is the basis of his original claim. Similar to the situation presented in DeFunis, a determination by this Court is no longer necessary to compel the payment of the amount in controversy, or to prevent it. The controversy is no longer "live." The parties lack "a legally cognizable interest in the outcome."

That the intervening events or facts that make a controversy moot can be brought by the plaintiff has long been accepted by the United States Supreme Court. Heitmuller v. Stokes, 256 U.S. 359 (1921). In Heitmuller, the plaintiff originally brought suit in the Supreme Court of the District of Columbia to recover from the defendant possession

of land located in Washington. The Washington Supreme Court found in favor of the plaintiff. The decision was affirmed by the Court of Appeals for the District of Columbia. Id. at 360. The United States Supreme Court granted a writ of error. Id. However, before the case could be heard, the plaintiff sold his entire interest in the property. The Court held that this made the issue moot, for the plaintiff had "no further interest in the case . . . except to recover costs and rental due because of the wrongful detention of the property." Id. at 361.

Another case illustrative of the point that subsequent actions of a plaintiff may make an action moot is the Fifth Circuit case, Troy State U. v. Dickey, 402 F.2d 515 (5th Cir. 1968). Dickey, a former student newspaper editor, sued Troy State University when the University denied him readmission after he had been expelled for refusing to follow a faculty advisor's instructions to publish a certain editorial, but instead published his own article. Id. at 516. Dickey challenged the action of the University on the ground that the denial of his readmittance violated his First Amendment right of free speech. Id. After the Writ of Certiorari was granted, Dickey filed an affidavit with the Court stating that he did not plan to re-enter the University to complete his undergraduate degree. Id. Despite both parties urging to decide the case on the merits, "notwithstanding that the only relief sought by Dickey was to require the University Trustees to re-enroll him at Troy State, relief which he now does not seek," the Court held that the issue was moot, and remanded it for dismissal. Id. The Court stated that the case was moot for "there is no longer a subject matter upon which the judgment of this court can operate." Id.

Another somewhat analogous situation in which this Court has recognized that actions taken by a plaintiff subsequent to the granting of Writ of Certiorari may make a case moot, are the settlement cases. In Verret v. Oil Transport Co., Inc., 365 U.S. 768 (1960), and J. Aron & Co.

v. Mississippi Shipping Co., 361 U.S. 115 (1959), this Court held that consent judgment entered by the lower Court subsequent to the filing and granting of the petition for Writ of Certiorari makes a case moot.

II.

THIS CASE SHOULD BE DISMISSED BECAUSE THIS CASE IS MOOT, AND IT DOES NOT FALL WITHIN THE "CAPABLE OF REPETITION, YET EVADING REVIEW" EXCEPTION.

As the petitioners have noted in their brief, this Court in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911), for the first time recognized an exception to the mootness doctrine. This Court held that a case, although moot, may be entitled to review on the merits if the issue presented by the case is "capable of repetition, yet evading review." Id. at 515, Petitioner's brief at 3. In Sosna v. Iowa, 419 U.S. 393 (1975), the Supreme Court, in the absence of a class action, limited the "capable of repetition, yet evading review" exception to situations in which the following two elements were present:

1. The challenged action was in its duration too short to be fully litigated prior to its cessation or expiration; and

2. There was a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149 (1975), (citing Sosna v. Iowa, 419 U.S. 393 (1975).

Application of these limitations is illustrated in Weinstein v. Bradford, 423 U.S. 147 (1975). The facts of that case were that the plaintiff, Bradford, sued members of the North Carolina Parole Board, alleging that he was entitled under the Fourteenth Amendment of the Constitution to certain procedural rights when his eligibility for parole was considered, and that he had been denied these rights. Id. at 147. The Court held that the case was moot when it found that after its grant of writ, but prior to its handing down its decision, Bradford had been completely released from supervision, and thus "from that date forward it is

plain that respondent can have no interest whatever in the procedures followed by petitioners in granting parole." Id. at 148. The Court rejected the petitioners' (the Board's) argument that the case was not moot because the issue presented by it "is capable of repetition, yet evading review." The Court's rejection was based on its finding that there was no reasonable expectation that the respondent would be subjected to the same action again. The Court stated that: "While petitioners will continue to administer the North Carolina Parole System with respect to those who at any given moment are subject to their jurisdiction, there is no demonstrated probability that respondent will again be among that number." Id. at 149.

Another illustration is presented in DeFunis v. Odegaard, 416 U.S. 312 (1974). In that case, the Court held that a question "capable of repetition, yet evading review" was not presented by the facts of the case. This holding was based on the Court's finding that DeFunis "will never again be required to run the gauntlet of the Law Schools' admissions process, and so the question is certainly not 'capable of repetition' so far as he is concerned." Id. at 319 (emphasis added). Additionally, the Court stated "just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the law school remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court . . . ." Id.

In applying the two-pronged limitation to the facts presented in this case, it is apparent that the "capable of repetition, yet evading review" doctrine is inapplicable. Respondent is no longer residing in the State of Nebraska. He has moved to the State of Washington. This is one of the reasons he was interested in accepting the payment of the amount in controversy and terminating the issue. Since he

no longer resides in Nebraska it is not demonstrable that respondent will be subjected to the same action again.

Additionally, as in DeFunis, although there is no reason to suppose that respondent will be subject to the same action again, this does not mean that in the future the issues he raised will evade the Court. The petitioners themselves indicate in their brief that "[i]ncluding this case, writs of certiorari have been granted on the negligence issue raised by this case three times in the last three years." Id. at 3.

III.

THIS CASE SHOULD BE DISMISSED BECAUSE THIS CASE IS MOOT, AND IT DOES NOT FALL WITHIN THE "CLASS ACTION" EXCEPTION.

The petitioners argue that the action brought in this case is a constructive class action, and although the case may be moot to the representative of the class, it is not moot to the class as a whole, and thus the Court may exercise jurisdiction and decide the case on its merits. Sosna v. Iowa, 419 U.S. 393 (1974); Roe v. Wade, 410 U.S. 113 (1973); Petitioner's Brief at 4. This reasoning, however, completely ignores Federal Rule of Civil Procedure 23, Class Actions. This case was never duly certified as a class action pursuant to that rule. The necessity that Rule 23 be followed in order to avoid the doctrine of mootness because a class action is involved is illustrated in this Court's decision of Board of School Comm'r. v. Jacobs, 420 U.S. 128 (1975).

In that case, the original action was brought in Federal District Court by six named plaintiffs seeking to have declared unconstitutional regulations and rules promulgated by the Commissioners, and to the enforcement of those regulations and rules enjoined. Id. at 128. At the time the action was brought, all six plaintiffs were high school students attending schools managed by the Board of School Commissioners. Id. at 129. By the time certiorari was granted, and oral argument was heard, all six plaintiffs had graduated from the school system. Id. The Court stated

that the case would not be moot if it was duly certified as a class action pursuant to Federal Rule of Civil Procedure 23, and (1) "a controversy still exists between petitioners and the present members of the class," Id., and (2) "the issue in controversy is such that it is capable of repetition yet evading review." Id.

The Court held that the case was moot because the parties had inadequately complied with Rule 23(c); "no other effort was made to identify the class or to certify the class action." Id. The Court stated that "[t]he need for definition of the class purported to be represented by the named plaintiffs is especially important in cases like this one where the litigation is likely to become moot as the initially named plaintiffs prior to the exhaustion of appellate review." Id. at 30.

Similarly, in Pasadena City Bd. of Education v. Spangler, 427 U.S. 424 (1976), the Court held that in a school segregation case in the United States Supreme Court, where all the plaintiffs have graduated from the School System, the case becomes moot where there has been no certification of any class action under Rule 23. Id. at 430. This holding was made although the suit was filed as a class action and was treated as a class action by the parties thereto. Id.

IV.

THIS CASE SHOULD NOT BE DECIDED ON THE MERITS BY THIS COURT SIMPLY BECAUSE THERE IS A NEED TO RESOLVE SIGNIFICANT QUESTIONS, BECAUSE SUCH A DECISION WOULD VIOLATE ARTICLE III OF THE UNITED STATES CONSTITUTION.

An additional argument made by the petitioners in their brief is that even if the issue is moot, the Court may in its discretion decide the issue if there are strong policy reasons for it to do so. Petitioners' Brief at 5. This Court in Richardson v. Ramirez, 418 U.S. 24 (1974), however, stated that "while the Supreme Court of California may choose to adjudicate a controversy simply because of its public importance, and the desirability of a state-wide

decision, we are limited by the case-or-controversy requirement of Article III to adjudication of actual disputes between adverse parties." Id. at 36. The two recognized exceptions to the mootness doctrine do not, by their operation, take the Court outside the Constitution, because a case and controversy continue to exist between the parties involved.

The rationale behind the class action exception is that although "the controversy is no longer live as to [the named representative] it remains very much alive for the class of persons [the representative] has been certified to represent." Sosna v. Iowa, 419 U.S. 393, 401. Similarly, the rationale behind the other recognized exception to the mootness doctrine, "capable of repetition, yet evading review," is that there is a reasonable expectation that the same complaining party would be subjected to the same action again." Weinstein v. Brandford, 423 U.S. 147, 149 (1975).

If the Court is given discretion to decide cases which are moot to all parties involved, presently and in the future, such as presented in this case, the Court would be going outside the limitation mandated by the United States Constitution. This Court has repeatedly stated that to constitute a "case or controversy" there must be an actual controversy over an issue, not a desire for an abstract declaration of law." In Re Summers, 325 U.S. 561 (1954); Svbron v. New York, 392 U.S. 401, 50 n. 8 (1965).

CONCLUSION

For the reasons above, we urge this Court to grant respondent's motion to dismiss this case as moot.

Respectfully submitted,

BY KEVIN COLLERAN
CLINE, WILLIAMS, WRIGHT,
JOHNSON & OLDFATHER
1900 First National Bank Bldg.
Lincoln, Nebraska 68508

Member of the Bar of the
United States Supreme Court

No. 79-1734

DEC 3 19
MICHAEL RODAK, JR

In The

Supreme Court of the United States

October Term, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,
Petitioners,

vs.

BERT TAYLOR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF ON THE MERITS

PAUL L. DOUGLAS
Attorney General
J. KIRK BROWN
Assistant Attorney General
State of Nebraska
2115 State Capitol Building
Lincoln, Nebraska 68509
Tel. (402) 471-2682
Attorneys for Petitioners.

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

QUESTIONS PRESENTED FOR REVIEW

1. Whether certain types of property are so *de minimis* as to not be protected by the Fourteenth Amendment under 42 U. S. C. § 1983.

2. Where a state prisoner claims to have suffered a tortious loss of property, whether the existence of a state tort claims remedy available to that prisoner provides him with such a level of due process as to satisfy requirementes of the Fourteenth Amendment.

3. Whether simple negligence, if proven, may form the basis of a judgment under 42 U. S. C. § 1983.

4. Whether the record supports a finding that either of the petitioners were negligent.

LIST OF PARTIES

The caption of this case contains the names of all parties.

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PETITIONERS' BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of District Judge Albert G. Schatz granting the respondent's motion for summary judgment is unreported and appears as Appendix B to the Petition for Writ of Certiorari.

The opinion of the Court of Appeals is also unreported (*See,* 620 F. 2d 307) and appears as Appendix C to the Petition for Writ of Certiorari.

JURISDICTION

The judgment of the Circuit Court of Appeals was filed January 29, 1980. The petitioners' petition for rehearing to the Circuit Court of Appeals was denied on February 29, 1980. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1). A Writ of Certiorari was granted October 20, 1980.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. 42 U. S. C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

action at law, suit in equity, or other proper proceeding for redress.

3. Neb. Rev. Stat. § 81-8,209, et seq. (Reissue 1976) appears as Appendix E to the Petition for Certiorari.

STATEMENT OF THE CASE

This action was filed in the United States District Court for the District of Nebraska under 42 U. S. C. § 1983 by a prisoner of the State of Nebraska to recover the value of certain hobby materials lost while being stored for the prisoner at the Nebraska Penal and Correctional Complex (NPCC), Lincoln, Nebraska. Named as defendants were Robert Parratt, Warden of NPCC, and Francis Lugenbill, Hobby Manager at NPCC (J. A. 5). The case was decided upon the plaintiff's Motion for Summary Judgment (J. A. 18).

The hobby materials in question were ordered by the plaintiff and paid for by him in accordance with NPCC procedures (Petition for Certiorari, Appendix A, paragraph 2). When the items arrived at NPCC a receipt was signed for them by two Hobby Center employees, one civilian and one inmate (J. A. 15, answer 7; J. A. 17, answers 4-8). These items were retained at the Hobby Center because at the time of their arrival the plaintiff was in disciplinary segregation and was not permitted hobby materials (Petition for Certiorari, Appendix A, paragraph 4). Neither of the parties who signed the receipts for the property in question were named as defendants (J. A. 5).

When the plaintiff left disciplinary segregation he attempted to claim his property at the Hobby Center but various searches by NPCC personnel failed to locate it (J. A. 17-18, Answers 9-13; Petition for Certiorari, Appendix A). The undisputed value of the property in question was $23.50.

The district court, upon consideration of the record, granted the plaintiff's motion for summary judgment (Petition for Certiorari, Appendix B), specifically finding that "negligence can form the foundation for an action under section 1983."

On appeal the judgment of the district court was summarily affirmed (Petition for Certiorari, Appendix C).

SUMMARY OF ARGUMENT

1. There exist certain *de minimis* levels or values of property which are not entitled to the protection of the Fourteenth Amendment. The value of the property here is $23.50. If that property is *de minimis,* then deprivation of that property does not violate the Fourteenth Amendment and proof of that loss does not create a basis for liability under 42 U. S. C. § 1983.

2. In order to constitute a deprivation of property under the Fourteenth Amendment there must be a governmental "taking" of such property. Such "taking" is inherently an *intentional* act and occurs for a governmental purpose. The loss of property due to the simple negligence of governmental employees is not an inten-

tional act and fulfills no governmental purpose. Thus, such a loss does not violate the Fourteenth Amendment. In the absence of a violation of a right guaranteed the respondent by the Fourteenth Amendment, no basis for liability under 42 U. S. C. § 1983 exists.

3. The Fourteenth Amendment guarantees a citizen "due process" with respect to a property deprivation. It does not guarantee the citizen he will not be deprived of his property. If the state can negligently deprive a person of his property within the meaning of the Fourteenth Amendment, an adequate, state afforded, post-loss remedy should provide the citizen all of the process he is due under that Amendment. The statutes of the State of Nebraska afforded the respondent such a remedy. He was not denied his property without the availability of the process he was due under the law, and thus there is no basis for liability under 42 U. S. C. § 1983.

4. 42 U. S. C. § 1983 was not intended by the Congress to penalize negligent conduct. Its intent was to penalize the knowing malfeasance or nonfeasance of government officials.

In cases concerning 42 U. S. C. § 1983 this Court has consistently allowed to stand Circuit Court decisions which concluded that negligent conduct did not create liability under that statute, while consistently finding in favor of governmental defendants in those cases in which lower courts have attempted to impose liability under a simple negligence standard.

Furthermore, the concept that simple negligence could give rise to a cause of action under 42 U. S. C. § 1983 is

inconsistent with both the "deliberate indifference" standard employed by this Court in *Estelle v. Gamble,* 429 U. S. 97 (1976), and the evaluation of actions which give rise to a qualified immunity for correctional personnel.

5. The record before the lower courts did not establish that either of the petitioners was negligent. Their only duty to the respondent was to take reasonable efforts to protect his property. This they did by creating a system for safeguarding property contained in an inmate's incoming mail. There is no evidence that the system devised was generally defective. There is only evidence that the system failed in this one instance. The petitioners had no personal contact with the property prior to its loss.

To hold the petitioners liable on this record is to require them to function as *insurers* of an inmate's property. No negligent acts were proven.

ARGUMENT

I.

Fourteenth Amendment, Due Process and Inmate Property Loss.

In this case the respondent (a state prisoner) brought a 42 U. S. C. § 1983 (hereinafter § 1983) action against the petitioners (the Warden and a subordinate officer) on allegations that property valued at $23.50 had been lost while being held for him by institutional personnel (none

of whom were defendants below). The district court concluded the respondent had proven a claim based upon the violation of his rights under the Fourteenth Amendment in that he had, by the negligence of the petitioners, been denied his property without due process of law.

In *Baker v. McCollan,* 443 U. S. 137 (1979), this Court stated: "The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right 'secured by the Constitution and laws.'" *Id.* at 140. In this instance, the initial question is whether, under these facts, the Fourteenth Amendment's due process clause protects the respondent from the negligent deprivation of his property by state employees.

A. Is Property Valued at $23.50 Entitled to the Protection of the Fourteenth Amendment?

The value of the property here in question is $23.50. This Court has in the past discussed the possibility that there are minimal limits to the value of property to be afforded due process protection. *Fuentes v. Shevin,* 407 U. S. 67, 90, n. 21 (1972); and *Sniadach v. Family Finance Corporation of Bay View,* 395 U. S. 337, 342 (1969) (Harlan, J., concurring). Establishing an arbitrary limit to the amount which must be in controversy before a § 1983 claim for loss of property without due process of law would provide this Court a mechanism to stem, to a limited extent, the tide of state prisoner § 1983 litigation flowing into the federal courts. *See, Nickens v. White,* 536 F. 2d 802 (8th Cir. 1976); *Howard v. Swenson,* 426 F. 2d 227 (8th Cir. 1976) *cert. denied,* 400 U. S. 948. Where or whether that line should be drawn presents a difficult question which only this Court may resolve, par-

ticularly in view of Mr. Justice Harlan's conclusion that the loss of the "use" of approximately $31.00 is not *de minimus*. *Sniadach v. Family Finance Corp., supra. See also,* Abdalian and Lachman, *Federal Court and Small Claims: Prisoners' § 1983 Actions and § 1983,* 33 Ark. L. Rev. 90 (1979).

B. Is a State Prisoner Provided Process Adequate Under the Fourteenth Amendment Where the State Affords Him a Remedy to Redress the Loss of Property Caused by the Negligence of Its Agents?

1.

In this case we initially question whether property loss occasioned by the negligent conduct of a state employee even falls within the concept of a "taking" as contemplated by the Fifth and Fourteenth Amendments. In essence, we believe that the constitution contemplates a "taking" as an *intentional* governmental act and not negligence. "Before a taking can be established, it must be clear that there was an *intent* by the defendant to take private property." (Emphasis added.) *Sun Oil Co. v. United States,* 577 F. 2d 786, 818 (Ct. Cl. 1978). *See also, Foster v. United States,* 607 F. 2d 943, 950 (Ct. Cl. 1979). A loss of property occasioned by simple negligence is not an intentional act and therefore should not be considered the type of "taking" to which the Constitution attaches the requirement of due process.

In other important respects a negligently caused loss of property does not fall within standard concepts of a governmental taking.

> The Fifth Amendment's guarantee that private property shall not be taken *for a public use* without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U. S. 40, 49 (1960) (Emphasis added). The property in question here was not taken by governmental agents. The current possessors of the property in question, and the purpose to which it has been put, remains a mystery. What is clear is that the property was not taken intentionally or "for a public use." "It is true that not every destruction or injury of property by governmental action has been held to be a 'taking' in the constitutional sense." *Id.* at 48. The respondent here attempts to accomplish exactly the same result under the Fourteenth Amendment that the respondent in *Paul v. Davis,* 424 U. S. 693 (1976), sought unsuccessfully to do.

> [The respondent] apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tortfeasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.

Id. at 701. (Emphasis added.)

2.

Assuming for the moment, however, that negligently lost property has been "taken" by the state within the meaning of the Fourteenth Amendment, what process is due the citizen for such loss? Obviously, the citizen can-

not be provided due process *prior* to a loss occasioned by negligence. If no opportunity exists to provide due process prior to the loss, one must determine whether the provisions of the Amendment have at that point already been abridged or whether affording the citizen subsequent process will satisfy its requirements.

In *Arnett v. Kennedy,* 416 U. S. 134 (1974), the Court considered the due process entitlements under the Fifth Amendment of a federal employee dismissed from his position. The plaintiff claimed that he should be entitled to a full due process hearing *prior* to his discharge rather than being afforded a full due process hearing subsequently. This Court held, "[A] hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." *Id.* at 157.

In this case, there could be no *pre*-loss hearing and Neb. Rev. Stat. §§ 81-8,209, et seq. (Reissue 1976), (Petition for Writ of Certiorari, Appendix E) provided the respondent an adequate post-loss process by which to seek redress. However, as did the appellee in *Arnett v. Kennedy, Id.,* the respondent chose not to avail himself of the process afforded him. He should be afforded no greater relief.

As Mr. Justice White discussed in the opinion he filed in *Arnett v. Kennedy, Id.* at 171-203, the Court has repeatedly upheld, under due process challenge, procedures which provide a citizen an opportunity, *after* the loss is suffered, to seek redress.

> This basic principle has unwaveringly been applied when private property has been taken by the

> State. A fundamental requirement of due process is "the opportunity to be heard." *Grannis v. Ordean,* 234 U. S. 385, 394 (1914). "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo,* 380 U. S. 545, 552 (1965). Where the Court has rejected the need for a hearing prior to the initial "taking," a principal rationale has been that a hearing would be provided before the taking became final. See *North American Cold Storage Co. v. Chicago,* 211 U. S. 306 (1908) (seizure of food unfit for consumption); *Central Trust Co. v. Garvan,* 254 U. S. 554 (1921) (seizure of property under Trading with the Enemy Act); *Corn Exchange Bank v. Coler,* 280 U. S. 218 (1930) (seizure of assets of an absconding husband); *Phillips v. Commissioner,* 283 U. S. 589 (1931) (collection of a tax); *Bowles v. Willingham,* 321 U. S. 503 (1944) (setting of price regulations); *Fahey v. Mallonee,* 332 U. S. 245 (1947) (appointment of conservator of assets of savings and loan association); *Ewing v. Mytinger & Casselberry,* 339 U. S. 594 (1950) (seizure of misbranded articles in commerce). While these cases indicate that the particular interests involved might not have demanded a hearing immediately, they also reaffirm the principle that property may not be taken without a hearing at some time.

Id. at 178-179). The Nebraska tort claims procedure provided the respondent exactly that type of opportunity.

In *Ingraham v. Wright,* 430 U. S. 651 (1977), this Court faced the question of what process was required where corporal punishment in the public schools was involved. This Court concluded that the Fourteenth Amendment did not require notice and hearing prior to the imposition of punishment. More applicable to this case, however, is the following: "When only an invasion of a property interest is involved, there is a greater likeli-

hood that a damages award will make a person completely whole . . . In the property context, therefore, frequently a postdeprivation state remedy may be all the process that the Fourteenth Amendment requires." *Id.* at 701 (Stevens, J., dissenting).

If a state-afforded, post-loss process is available to a prisoner who has suffered a property loss due to the negligence of a state employee, and if that process otherwise comports with due process requirements, then the prisoner is afforded his Fourteenth Amendment rights by virtue of the existence of that process. If afforded the process due him under the Fourteenth Amendment, the prisoner's rights have not been abridged and no basis for a cause of action exists under § 1983.[1]

This position should not be confused with a requirement that state administrative remedies must be exhausted prior to filing a § 1983 action. Not only is this concept directly contrary to the long standing proposition that § 1983 litigants cannot be required to exhaust state remedies, *Monroe v. Pape,* 365 U. S. 167, 187 (1961), but ignores the fact that a person is only entitled to due process once for one loss. If the state can provide a system which meets the requirements of the Fourteenth Amendment and afford possible redress where property

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1 When faced with a factual situation almost identical to the present case, the conclusion that a state tort remedy prevented a Fourteenth Amendment violation was the first alternative for resolution employed in *Bonner v. Coughlin,* 517 F. 2d 1311 (7th Cir. 1975) *mod. en banc* 545 F. 2d 565, *cert. denied,* 435 U. S. 932. The en banc decision subsequently rejected the prisoner's cause of action on the alternative ground that negligence does not state a cause of action under § 1983.

has been lost due to the negligent acts of a state employee, then nothing further need be afforded. No property has been taken without due process. No right secured by the Constitution or laws has been abridged. *Baker v. McCollan, supra.* No basis for an action under § 1983 exists.

* * *

We believe it incumbent upon us to point out here one difficulty we observe with the concept that due process afforded at the state level avoids § 1983 liability. It remains true that the Eleventh Amendment prohibits § 1893 judgments against the states but does not prohibit awards of damages against individual governmental defendants. If the existence of a state administrative remedy (where the state has volunteered to pay) is found to eliminate any jurisdictional basis for § 1983 judgments against individual defendants, how does one justify imposing personal liability upon another defendant, in another state, for exactly the same conduct, simply because his state has not chosen to abrogate its sovereign immunity? This conclusion leaves individual defendants exposed to personal liability under § 1983 in one instance and shielded from liability in another, where the only variable (the state's decision to waive its sovereign immunity) is totally beyond the defendants' control.

Even if one is willing to conclude that the Fourteenth Amendment, as enforced through § 1983, compels the states to abrogate their sovereign immunity or allow their employees to suffer the risk of personal liability under that statute, this places the personal fortunes of individual governmental servants at risk in a conflict between

the state and federal governments which they are powerless to affect.

We believe a more equitable solution can be found. One which would uniformly protect or penalize the acts of state employees based upon the quality of their conduct alone. This can be done by a final resolution of the question of whether negligent conduct creates a basis for liability under § 1983.

II.

The Issue of Negligence.

The next question presented is whether liability may be imposed under § 1983 for negligent conduct. In this case the United States District Court for the District of Nebraska held, and the United States Court of Appeals for the Eighth Circuit summarily affirmed the proposition that, "[N]egligence can form the foundation for an action under Section 1983." (Petition for Certiorari, Appendix B). It is the belief of the petitioners that neither the legislative history of § 1983 nor the rulings of this Court interpreting § 1983 support the proposition adopted by the courts below.

The petitioners believe that in the absence of evidence that they abused their authority as officers of the State of Nebraska's penal system—in the absence of evidence establishing that they intended the loss in question to occur or displayed deliberate indifference to the potential for such loss—that no basis for an award of damages under § 1983 exists.

A. Legislative History.

The legislative history which underlies § 1983 was extensively discussed by this Court in *Monroe v. Pape, supra* (hereinafter *Monroe*). In *Monroe,* this Court concluded that the legislation which created § 1983 had three main purposes. First, to "override certain kinds of state laws" which were violative of the Fourteenth Amendment. *Id.* at 173. Second, to provide "a remedy where state law was inadequate." *Id.* "The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 174. Section 1983 was enacted against the backdrop of the lawless post civil war activities of the Ku Klux Klan, but it was not at the activities of the Klan that § 1983 was directed. "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind [§ 1983]." *Id.* at 174-175.

The conscious refusal of state officials to prosecute and bring to justice those persons terrorizing the newly enfranchized and other union supporters created the "momentum" for the passage of § 1983.

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective . . . Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress.

Cong. Globe, 42d Cong., 1st Sess., App. 374. In context then, the focus of § 1983, as relevant here, was to correct

the *intentional* malfeasance or nonfeasance of state officials during the near anarchy of reconstruction.

It is important here to contrast the evils which gave birth to § 1983 with the facts to which the respondent now seeks to have it applied. Compare the social evil inherent in the conscious willingness of state officials to ignore the murder, rape and mutilization of persons supposedly under their protection with the facts in this case. The petitioners were not willing spectators at the victimization of the respondent's rights. On the contrary, they actively established at the penal institution under their control a procedure to *protect* the respondent's property. The establishment of that system was the *only act* which ultimately brings them before this Court. To claim that the conscious creation of a system to safeguard an inmate's property and the subsequent failure of that system on a single occasion implicates the same type of wrongdoing contemplated by the creators of § 1983 does a disservice not only to the petitioners but to the history of § 1983 itself. As this Court stated in *Paul v. Davis, supra* at 669, "We think it would come as a great surprise to those who drafted and shepherded the adoption of . . . [the Fourteenth] Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent."

B. The Monroe Decision.

In *Monroe* six negro children and their parents sought an award of damages under § 1983 where they alleged their residence was broken into by thirteen police officers of the City of Chicago. They were taken from their beds

and made to stand naked in their living room while the entire residence was ransacked by the officers. This occurred at night and without either a proper search or arrest warrant. The father was subsequently taken to a police station and held incommunicato for approximately ten hours without any form of legal process. The father was then released without any charges being filed. *Monroe,* supra at 169.

The *Monroe* case was before this Court to determine if the allegations noted above stated a cause of action under § 1983. The claim of the police officers, raised successfully in the lower courts, was that their actions were so far beyond any legal authority they possessed that their actions could not be characterized as having been taken "under color of" state law.

This Court reviewed previous cases in which the meaning of the phrase "under color of" state law had been discussed and defined and attached the same interpretation to that phrase in § 1983 as it had to the same phrase in the criminal sections discussed in *Screws v. United States,* 325 U. S. 91 (1945); *United States v. Classic,* 313 U. S. 299 (1941); and *Williams v. United States,* 341 U. S. 97 (1951). "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic, supra* at 326. Thus, it was held in *Monroe*

that the illegality of the officers' actions did not shield them from liability under § 1983.

C. The Monroe Dicta.

Negligent conduct was not at issue in *Monroe*. The actions of the police officers in *Monroe* were clearly intentional. The question of whether negligent conduct can create liability under § 1983 has its birth, however, in a caveat placed in the plurality opinion in *Monroe* by Mr. Justice Douglas. "Section . . . [1983] should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe, supra* at 187. The purpose of this language, we believe, was to distinguish the application of § 1983 from the more stringent criminal standard of liability announced in *Screws v. United States, supra.* That case represented a challenge to a federal criminal statute (which was companion civil rights legislation to § 1983) on grounds of vagueness. Mr. Justice Douglas, writing for the plurality, struggled to uphold the statute in question, *Id.* at 94-100, and ultimately saved it from constitutional infirmity by the following interpretation of the word "willfully" contained in the criminal section. "[M]ore is required than the doing of the act proscribed by the statute . . . [Citations omitted] An evil motive to accomplish that which the statute condemns becomes a constituent element of the crime." *Screws v. United States, supra* at 101. The term "willfully," Mr. Justice Douglas noted, "connote[s] *more* than an act which is voluntary and intentional." *Id.* at 101. (Emphasis added.)

The purpose of the often quoted dicta from *Monroe* was not to create the "font of tort law" discussed in *Paul*

v. Davis, supra at 701, but to point out that § 1983 did not require proof of the additional element of "evil motive" deemed necessary for conviction under the criminal civil rights sections. *Monroe* cannot be read to say that proof an act was "voluntary or intentional" is not essential to liability under § 1983.

In this light, § 1983 should only be read against the background of tort liability that makes a man responsible for the natural consequences of his *intentional,* not negligent, acts. Such an interpretation is consistent with rulings by this Court subsequent to the *Monroe* decision.

D. The Concept that Negligent Conduct does not Create a Basis for Liability under § 1983 is Consistent with Previous Rulings of this Court.

Recent rulings of this Court have consistently allowed to stand lower court decisions which refused to allow recovery against governmental defendants under § 1983 based upon theories of negligence, and, in those cases in which lower courts had imposed liability under § 1983 for negligent conduct, this court has consistently resolved such cases so as to ultimately absolve the governmental defendants of liability.

1. Estelle v. Gamble

In *Estelle v. Gamble,* 429 U. S. 97 (1976), this Court considered the level of culpability necessary to create liability under § 1983 in an Eighth Amendment—medical treatment—context. "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does

not become a constitutional violation merely because the victim is a prisoner." *Id.* at 106.

If the ruling of the Circuit Court in the petitioner's case is allowed to stand, a prisoner's property will be afforded greater protection than his health by § 1983 and the Fourteenth Amendment. We believe the standard announced in *Estelle v. Gamble, Id.*, correctly balances constitutional requirements, common law negligence and the realities of life in a penal institution. This case does not.

Section 1983 had as its purpose, penalizing abuses of governmental power in an attempt to coerce proper conduct by state officials. Section 1983 cannot, by coercion, prevent simple negligence. By making negligence actionable under § 1983 this Court would only impose an additional burden upon the federal court system. Any manner of state neglect, *e. g.*, auto accidents, personal injuries, road repair, could then be litigated in federal court under § 1983. *Paul v. Davis, supra,* at 698-699.

2. Negligence Cases Where Liability Was Rejected by this Court.

In *Procunier v. Navarette,* 434 U. S. 555 (1978); and *Baker v. McCollan,* 443 U. S. 137 (1979), this Court accepted cases in which the lower courts had imposed liability under § 1983 for negligent conduct. In both cases, although the negligence question was not taken up, the governmental defendants were absolved from liability, and

two attempts to impose liability under § 1983 on a negligence theory failed.

In *Procunier v. Navarette, supra,* plaintiffs had successfully sought in the courts below to impose liability under § 1983 upon state prison officials for the defendants' negligent failure to forward plaintiffs' mail. This Court declined to resolve the negligence question, but held that prison officials were entitled to the qualified immunity described in *Scheuer v. Rhodes,* 416 U. S. 232 (1974); and *Wood v. Strickland,* 420 U. S. 308 (1975), if their actions could not reasonably have been known at the time they were taken to have been in violation of the inmate's clearly defined constitutional rights, and the defendants were absolved of liability under that immunity.

In doing so the Court discussed the level or type of intent which must be established by a plaintiff to defeat *Wood v. Strickland, supra,* immunity.

> The prison officers were charged with negligent and inadvertent interference with the mail and the supervisory personnel with negligent failure to provide proper training. To the extent that a malicious intent to harm is a ground for denying immunity, that consideration is clearly not implicated by the negligence claim now before us.

Procunier v. Navarette, supra at 566.

In *Baker v. McCollan, supra,* this Court again had before it the negligence question. The plaintiff had been erroneously incarcerated by the defendant police officers and held for several days due to their negligent failure to verify the plaintiff's identity. The lower court had granted the plaintiff relief under § 1983. In this case the Court

determined the negligence question need not be reached due to the fact that the plaintiff had failed to establish a violation of a constitutionally-protected right.

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner," Estelle v. Gamble, 429 U. S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.

Id. at 146. Other comments of the Court which lend further support to the conclusion that negligence does not create a basis for liability under § 1983 are very appropriate to the facts in this case.

> [T]he reckless failure of a police official to stop a pattern of clearly unconstitutional conduct by his subordinates could be enjoined under § 1983, here there is no indication that petitioner was aware, or should have been aware, either of the likelihood of . . . [the alleged misconduct] or of his subordinates' action in this case.

Id. at 148. Blackmun, J., concurring.

Here there is no showing the petitioners were aware of the respondent's loss or of any unusual risk posed to his property. The petitioners had established an adequate system to protect the property of inmates and, through no intervention of their own, that system failed. Mr. Justice Stevens, in *Baker v. McCollan, supra,* seemed to indicate that an occasional failure of an adequate system need not create liability for its operators under § 1983. "Certainly,

occasional mistakes may be made by conscientious police officers operating under the strictest procedures." *Id.* at 155 (Stevens, J., dissenting.)

In *Martinez v. California,* 444 U. S. 277 (1980), this Court rejected the claim that a state parole officer was liable under § 1983 for the death of a person at the hands of a parolee. The plaintiffs alleged the release of the parolee was negligent. This case was, again, decided on the basis that no constitutionally-protected right had been abridged. However, the Court stated, "Although a § 1983 claim has been described as 'a species of tort liability,' . . . [citation omitted], it is perfectly clear that not every injury in which a state official has played some part is actionable under that statute." *Id.* at 285.

These comments echo the concerns expressed in *Paul v. Davis, supra,* that § 1983 was not intended and should not be allowed to become "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 424 U. S. 701. In that case the plaintiff claimed governmental defendants had defamed him.

One must bear in mind that of all the actions taken with respect to inmates daily by prison administrators there are few, if any, which do not touch upon constitutionally-protected rights and are made under color of state law. In *Bell v. Wolfish,* 441 U. S. 520 (1979), this Court recognized the need to allow prison administrators freedom to perform their duties without undue interference by the federal courts. If the negligence of prison personnel becomes the legitimate object of § 1983 litigation, it is difficult to estimate the magnitude of the increase in liti-

gation which such a determination would produce, or its effect upon state prison administrators.

3. Cases Rejecting Negligence as a Basis of Liability Allowed to Stand.

This Court has consistently allowed to stand decisions of the Circuit Courts of Appeals that negligent conduct cannot form the basis of liability under § 1983.

In *Bonner v. Coughlin, supra,* note 1, this court was faced with almost exactly the same facts presented here. An inmate's personal property had been lost due to the alleged negligence of state prison personnel. However, in that case the Circuit Court denied the inmate relief under § 1983 on a negligence theory.

> *Monroe v. Pape, supra,* also carefully traced the legislative history of Section 1983. Neither the language of the statute nor its history shows that Congress was providing a federal remedy for damages caused by the simple negligence of a state employee. In enacting the Civil Rights Act, Congress was obviously intending to provide a deterrent for the type of conduct proscribed. If an officer intentionally causes a property loss, a remedy under Section 1983 might deter similar misconduct. On the other hand, extending Section 1983 to cases of simple negligence would not deter future inadvertence as much as in the case of intentional or reckless conduct. Consequently, the majority of Circuits hold that mere negligence does not state a claim under Section 1983. Otherwise the federal courts would be inundated with state tort cases in the absence of Congressional intent to widen federal jurisdiction so drastically.[2]

Id. at 545.

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2 For list of decisions referred to see, *Id.* at 545 n. 8.

The only distinguishing feature we can discern between *Bonner v. Coughlin, Id.* and the present case is that in the present case there exists even *less* evidence of negligence (if negligence is established at all).

In *Bogard v. Cook,* 586 F. 2d 399 (5th Cir. 1978), *cert. denied* 444 U. S. 833, a prisoner had suffered various and severe injuries while an inmate of a state penal institution. In that case the Circuit Court specifically discussed this Court's ruling in *Procunier v. Navarette, supra,* and stated:

> *Wood* [*v. Strickland, supra*] did not definitely establish the extent to which conduct less egregious than an affirmative intent to harm—simple negligence, gross negligence or recklessness—would satisfy the subjective 'malicious intent' requirement. *Navarette* appears to fill in that deficiency. The holding in *Navarette* squarely establishes that proof of simple negligence is not enough to pierce an official's immunity under § 1983.

Bogard v. Cook, supra at 411. The Circuit Court then concluded:

> In light of the Court's reference to the Restatement, we read the malicious intent prong of the official immunity defense to require proof that an official either actually intended to do harm to the plaintiff, or took an action which, although not intended to do harm, was so likely to produce injury that the harm can be characterized as substantially certain to result. The spirit of the rule reaches nonfeasance as well as misfeasance. It does not insulate an official who, although not possessed of any actual malice or intent to harm, is so derelict in his duties that he must be treated as if he in fact desired the harmful results of his inaction. At the same time, however, the test requires that a plaintiff show that the official's action, although labeled

> as "reckless" or "grossly negligent," falls on the actual intent side of those terms, rather than on the side of simple negligence.

Id. at 412. In view of that conclusion the plaintiff was denied recovery under § 1983. This Court declined to consider the case further.

Thus, on several recent occasions this Court accepted consideration of cases in which negligence was at issue and governmental defendants had been held liable. On each occasion the negligent conduct alleged was found ultimately *not* to create liability under § 1983. In cases in which the courts below had rejected the concept of § 1983 liability based upon allegations of negligence, however, those decisions were allowed to stand.

E. Creating Liability Under § 1983 for Negligent Conduct is Inconsistent with a Qualified Immunity.

1. The Qualified Immunity.

"A public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability." *Procunier v. Navarette, supra* at 569, Stevens, J., dissenting.

In *Scheuer v. Rhodes, supra,* this Court announced that officers of the executive branch of government were entitled to a qualified immunity or "good faith" defense to liability under § 1983. "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive

officers for acts performed in the course of official conduct." *Id.* at 247-248.

In *Wood v. Strickland, supra,* the details of that immunity were further defined.

> [W]e hold that a . . . [§ 1983 defendant] is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the . . . [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.

Id. at 322. In *Procunier v. Navarette, supra,* this qualified immunity was specifically made applicable to officers of a state penal system.

It is our belief that the existence of the qualified immunity mitigates strongly against the expansion of § 1983 into areas of negligent conduct. *See, Bogard v. Cook, supra.*

In *Scheuer v. Rhodes, supra,* the action in question was the intentional shooting of students by National Guardsmen. *Wood v. Strickland, supra,* involved the expulsion of two students from school. In both instances conscious decisions were made and actions taken by the governmental defendants. In both instances, the defendants were found entitled to a qualified immunity which hinged upon their state of mind at the time the decision in question was made.

Here the petitioners made no decision and took no action except to protect inmate property. The petitioners established a system to care for the property of the in-

mates under their supervision and without their knowledge that system failed in this single instance. The petitioners made no decision to take the respondent's property, nor did they refuse to take action to protect it. The situation as perceived by the petitioners at the time required no action, no decision. In the absence of a situation calling for a decision, how can a defendant in a § 1983 action form the thoughts necessary to evaluate his entitlement to a qualified immunity?

It must be concluded either that § 1983 defendants will now be held responsible for negligent conduct when intentional but mistaken conduct would shield them from liability under the qualified immunity, or that unintentional conduct simply does not state a cause of action under § 1983. Equity urges the latter conclusion.

2. The Public Policy.

The public policy which underlies the qualified immunity would be done an ultimate disservice if liability were upheld in this case.

> The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure.

Wood v. Strickland, Id. at 319-320. If this Court found such reasoning compelling in a case involving public school

administration, imagine the enhanced weight such logic brings to bear upon a penal system employee. In penal situations conceivably *every* act is taken under color of state law, and *every* act bears to one degree or another upon the constitutional rights of those confined.

We will not achieve the quality penal systems in this country we all desire if conscientious penal administrators must fear the imposition of damages, costs and attorneys fees every time a property loss is suffered by an inmate. For if the logic of the district court is carried to its logical extreme, *every* loss which occurs within a penal institution could arguably be attributed to negligent supervision of subordinate staff. The concerns of the minority in *Wood v. Strickland, supra,* seem even more appropriate when applied to the less desirable but equally essential business of penal administration. "[O]ne must wonder whether qualified persons will continue in the desired numbers to volunteer for service in public education." *Id.* at 331, Powell, J., dissenting.

F. Application of the Law to this Case.

Against this backdrop the rulings of the lower courts in this case should not be allowed to stand. The district court held the petitioners liable for allegedly negligent conduct under § 1983 when neither logic nor the statute mandate that result. Furthermore, the district court concluded that the petitioners knew or should have known that their alleged negligence would violate the respondent's constitutionally-protected rights. In order to be denied the qualified immunity made applicable to the petitioners by *Procunier v. Navarette, supra,* it must be

shown that the constitutional right alleged to have been violated was "clearly established." The constitutional right the respondent relies upon is the right to be free from the negligent deprivation of his property by state agents. How can it be said that right is clearly established in view of the cases discussed above? We do not believe the alleged constitutional right exists. Even if it does exist, it has yet to be clearly established, and the petitioners should not be penalized for not perceiving it.

III.

The Record in This Case does not Establish that the Petitioners were Negligent.

1.

The discovery documents (J. A. 13 and 16) and the stipulation (Petition for Certiorari, Appendix A) show only the existence and operation of the system, the very general responsibility of the petitioners for that system, the properly documented reception of the respondent's property at NPCC and the property's subsequent loss.

It is important to note what the record before the district court does *not* show. It does not show any personal involvement of the petitioners in the loss of the property in question. It does not show that the property handling system at NPCC was inadequate or had not generally performed the function of protecting the inmates' property. It indicates no knowledge on the part of the petitioners that the respondent's property faced an unreasonable risk of loss, or that the property was, in fact, subject to an unreasonable risk of loss.

2.

The final question is whether the record in this case establishes that the petitioners' actions in this case could properly be found to be negligent.

> Negligent conduct may be either: (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of or interest of another, or (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.

Restatement of the Law (Second), *Torts* 2d, § 289. In this case the lower courts held the petitioners liable under § 1983 for what they perceived as negligent conduct. But what was that conduct? The district court stated: "The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for Mr. Taylor." (J.A. 8, Petition for Certiorari, Appendix B).

First, it is clear that the petitioners did not personally fail to follow institutional mail procedures. If in fact those procedures were not complied with, it was by lower level employees of the institutional hobby center.

In what manner, then, did the petitioners abridge a duty to the respondent? Their only action was to establish a system for incoming mail to protect an inmate's property; in fact, seeking to avoid a perceived risk of loss. Surely that action was reasonable.

> [T]he care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable man in his position, with his information and competence, would recognize as neces-

> sary to prevent the act from creating an unreasonable risk of harm to another.

Restatement of the Law, supra, § 298. The record reflects no knowledge on the part of the petitioners that the system they had created represented a risk to the respondent's property or that the system was not functioning properly.

The district court in essence concluded that once having established a system to protect inmate property, the petitioners were on notice that should that system fail they would be automatically liable for the loss. This conclusion ignores both reality and standard conceptions of the law of torts. "Certainly, occasional mistakes may be made by conscientious . . . officers operating under the strictest procedures." *Baker v. McCollan, supra* at 155, Stevens, J., dissenting. "Obviously, no procedures the defendants might have employed would have provided an absolute guarantee against excessive and illegal acts such as pilfering by subordinates. But the Constitution does not require that of them." *Thorton v. Redman,* 435 F. Supp. 876, 881 (D. Del. 1977).

The rulings of the courts below mandate that the petitioners function as *insurers* of the property of the inmates in their charge. That ruling is inappropriate as a tort concept. It is unacceptable as a basis for liability under § 1983.

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CONCLUSION

The lower courts have, in this case, attempted to create a basis for liability under § 1983 which is not consistent with the rulings of this Court, the rulings of their sister courts, or the public policy which underlies § 1983. The most predictable results of upholding this new basis for § 1983 liability will be a marked increase in the number of prisoner lawsuits filed in the federal courts, a marked increase in the amount of time and money the federal judiciary will expend contending with these new filings, and a marked decrease in the morale of those persons conscientiously attempting to perform the thankless but essential task of maintaining and administering our states' penal systems. Funds from finite state corrections budgets will be drained from projects to upgrade institutional facilities and personnel and of necessity be dedicated to the continual litigation and occasional payment of minor inmate claims in the federal courts. All this will occur while completely adequate state remedies suffer a decline in use.

What attorney, presented with a simple negligence claim by a state prisoner, would elect to process that claim through a state claims system for little or no fee when he could be entitled to a comparatively handsome attorney's fee if the same case was successfully filed in federal court under § 1983? The processing of simple tort claims through the federal courts could prove quite lucrative to enterprising counsel. This fact, plus the state prisoners' natural inclination towards the federal courts, will bring ever increasing numbers of these minor claims to the

federal judiciary's doorstep while other litigants with much more substantive claims wait their turn.

In essence, no one would benefit from the rule here urged by the respondent, and many would be burdened. The prisoner has his remedy in the state administrative procedures and tort law. The federal courts, frankly, have better things to do with their time.

"At some point the benefit of an additional safeguard to the individual affected . . . and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews v. Eldridge,* 424 U. S. 319, 348 (1976).

We can conceive of no circumstance in which purely negligent conduct need state a claim under § 1983 and we urge this Court to so hold. However, we are aware of this Court's desire to carefully consider each situation as it arises.

> [T]he question whether an allegation of simple negligence is sufficient to state a cause of action under § 1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action.
>
> *Baker v. McCollan, supra* at 139-140

Therefore, we would urge this Court, if deemed necessary simply to rule that at least insofar as property loss under the Fifth and Fourteenth Amendments is con-

cerned, simple negligence does not give rise to a claim under § 1983, and reverse the decision below.

Respectfully submitted,

ROBERT PARRATT and
FRANCIS LUGENBILL, Petitioners,

By PAUL L. DOUGLAS
Attorney General of Nebraska

By J. KIRK BROWN
Assistant Attorney General

Attorneys for Petitioners

No. 79-1734

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

ROBERT PARRATT AND FRANCIS LUGENBILL,
Petitioners,

vs.

BERT TAYLOR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

KEVIN COLLERAN
1900 First National Bank Building
Lincoln, Nebraska 68508
(402) 474-6900
Court-appointed Counsel for Respondent

Of Counsel:
TERRY R. WITTLER

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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IN THE

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RESPONDENT'S BRIEF ON THE MERITS

JURISDICTION

Although Respondent raised no objection to the jurisdiction of the Supreme Court in his brief in opposition to the Petition for Writ of Certiorari, it has subsequently become apparent that the Court may not have jurisdiction of this matter. Since this Court can consider the matter of its jurisdiction on its own motion, *see Butler v. Dexter,* 425 U.S. 262 (1976); or when raised for the first time in oral argument by the appellee, *Sibron v. New York,* 392 U.S. 40 (1968); and since it has even been said that objections to

jurisdiction can be raised at any time before this Court renders its decision, *Heirs of Nicholas Wilson v. Life & Fire Ins. Co. of New York,* 37 U.S. (12 Pet.) 140 (1838), the Respondent is raising the matter of this Court's jurisdiction in its brief on the merits, notwithstanding Sup.Ct.Rule 22.3.

The Court of Appeals for the Eighth Circuit filed its opinion in this action on January 29, 1980. (Pet.App. 10). The Petitioners' Petition for Writ of Certiorari was not filed in this action until May 1, 1980, three days after the ninety day period allowed by statute. 28 U.S.C. §2101(c) (1959).

Neither the Petitioners' petition for rehearing, filed February 19, 1980 (R. 13), nor their motion for enlargement of time, filed February 15, 1980 (R. 11) were effective to extend the time for filing the writ since they were not filed within 14 days of the court's opinion as required by Fed.R.App.P. 40(a). *See,* Sup.Ct.Rule 20.4. Nor were Petitioners entitled to an additional three days for mailing. Fed.R.App.P. 25(a); *and see Lashley v. Ford Motor Co.,* 518 F.2d 749 (5th Cir. 1975).

Respondent recognizes that the court of appeals has the power to enlarge the time in which a petition for rehearing may be filed. *See* Fed.R.App. 26(b). Such a motion can be granted on a showing of good cause if filed within the original time period for which an extension is sought. *See* Notes of Advisory Committee on Appellate Rules 1967. *See also,* Fed.R.Civ.Pro. 6(b); Sup.Ct.Rule 34; and Fed.R.Cr.P. 45. When a motion is filed out of time a showing of excusable neglect for failure to request an extension in a timely manner is normally required. Notes of Advisory Committee on Appellate Rules 1967. In this action, no such showing was made. (R. 11).

The Petitioners' belated motion for enlargement of time was apparently granted as a matter of course by the clerk of

the court of appeals. (Pet. App. 12). There is no indication that the court of appeals considered the lateness of the Petitioners' petition for rehearing which it denied on February 29, 1980.[1] (R. 15). Whether the appellate court mistakenly considered the petition or not is irrelevant for purposes of an appeal since, as a leading treatise notes, if "the motion for rehearing is filed out of time, the periods for seeking review by the Court are not effected, even if the lower court entertains and considers the motion." 12 *Moore's Federal Practice* ¶607.04[12] at 9-31 (1980). This Court has held that an untimely motion for reconsideration, even when considered and acted upon by the trial court, will not extend the time for filing a direct appeal in this Court. *Browder v. Director, Ill. Dept. of Corrections,* 434 U.S. 257 (1978). No reason exists to adopt a different rule with respect to untimely petitions for rehearing filed in the appellate court.

Petitioners' petition for writ of certiorari was filed in this Court 93 days after the court of appeals released its opinion in this matter. No timely petition for rehearing having been filed to toll the running of the 90-day period, this Court is without jurisdiction of this action and the writ of certiorari should be dismissed. *Cf. Gibson Distributing Co. v. Downtown Development Assoc. of El Paso, Inc.,* 439 U.S. 1000 (1978).

---

[1]Nor can it be said that Respondent waived any objection he might have had to the granting of the extension since no answer to the petition for rehearing was requested by the court and none may be filed absent such a request. Fed.R.App.Pro. 40(a). Although Respondent was aware that Petitioners sought additional time in which to file their petition for rehearing he was unaware of the defect in the procedure used to do so until preparation for this brief began.

STATUTES INVOLVED

I. Jurisdiction

Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. §2101(c) (1959).

II. Attorneys Fees

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §1988 (Supp. 1980).

III. Statute of Limitations

Actions upon liability created by federal statute. All actions upon a liability created by a federal statute, other than a forfeiture or penalty, for which actions no period of limitations is provided in such statute shall be commenced within three years next after the cause of action shall have accrued.

§25-219 *Neb.Rev.Stat.* (Reissue 1979).

IV. Exhaustion of Remedies

Section 7, Civil Rights of Institutionalized Persons Act of 1980, Pub.L. No. 96-247, 94 Stat. 349, 352-53 appears as Appendix A to this brief.

V. Prison Administration

Sections 83-177; 185(1); & 187(1) *Neb.Rev.Stat.* (Reissue 1976) appear as Appendix B to this brief.

STATEMENT OF THE CASE

In accordance with institutional rules, the Respondent, Bert Taylor, Jr., an inmate at the Nebraska Penal and Correctional Complex ("NPCC"), ordered hobby materials by mail on April 1 and April 8, 1975. (J.A. 7, ¶¶2 & 3). Mr. Taylor was subsequently placed in the adjustment center where hobby materials were not permitted. (J.A. 7, ¶4). The hobby materials arrived at the institution mail room on April 17 and April 21, 1975. (J.A. 7, ¶5). On June 2, 1975, Mr. Taylor had been released from the adjustment center and was entitled to the possession of his hobby materials; however, he received no response to his request for the items. (J.A. 7, ¶6). Mr. Taylor subsequently contacted Robert Rybold, the grievance supervisor about the matter. [Petition for Writ of Certiorari, Appendix (hereafter "Pet.App.") 1, ¶¶1-5]. Mr. Rybolt was unable to locate the packages (Pet.App. 2, ¶5).

After various correspondence with the United States District Court for the District of Nebraska which is outlined in the court's initial order in this matter (J.A. 2), Respondent Taylor commenced this action under 42 U.S.C. §1983 (1974) by filing his handwritten *pro se* complaint on March

24, 1976. (J.A. 5). His complaint set forth the facts as outlined above and he contended "that his rights under the Fourteenth Amendment of the Constitution of the United States were violated. That he was deprived of his property and Due Process of Law." (J.A. 8, ¶ 1). He prayed for a declaration that the Petitioners' acts violated his civil rights; for compensatory damages of $1,000 for each of the Petitioners, and for punitive damages of $1,000 from the Petitioner Lugenbill. (J.A. 9, ¶ ¶ 1-3).

Petitioners filed this answer on April 16, 1976, generally admitting the allegations of Taylor's complaint but alleging that he in fact received the materials. (J.A. 12, ¶ ¶ 1-3). On April 19, 1977, counsel was appointed for Respondent. (R. 32). At the suggestion of counsel for the petitioners at a hearing on Respondent's motion for default judgment, a set of stipulated facts became the basis upon which the court ruled on a motion for summary judgment. (Pet.App. 1-3).

The district court addressed the three issues it felt were before it:[2]

1. Whether negligence by state officials is actionable under § 1983;
2. Whether penal complex officials are immune from damages; and
3. Whether the property right involved in this case is cognizable under § 1983. (Pet.App. 5).

---

[2]The question of whether the Petitioners were entitled to a qualified immunity defense was neither plead nor proved by the Petitioners. (J.A. 12, 13). The question of whether the Nebraska Tort Claims Act, §81-8,209 *et. seq. Neb.Rev.Stat.* (Reissue 1976) (Pet.App. 12) provided Respondent with sufficient due process so as to satisfy the demands of the Fourteenth Amendment was never presented to the court. (J.A. 12, 13; Pet.App. 4).

Respondent's motion for summary judgment filed June 5, 1978 (J.A. 18) was sustained on October 25, 1978. (Pet.App. 4). Judgment was entered in favor of Mr. Taylor for the value of the hobby items and attorneys fees and costs on April 27, 1979. (J.A. 19).

The record does not support the Petitioners' characterization of Respondent's property as having been "lost" as stated in their brief. (Petitioners' Brief on the Merits, 3). The record does reflect that on April 17, 1975, and again on April 21, 1975, packages ordered and paid for by Respondent in conformance with NPCC regulations arrived at the complex and on each of those occasions the package receipt was signed by an individual other than the Respondent in direct violation of institutional regulations. (J.A. 7, ¶ 5; J.A. 10, Ex. A; and Pet.App. 2, ¶ ¶ 7 and 8). The record does not reflect whether the goods were lost, stolen, intentionally destroyed, unintentionally destroyed, or discarded. (Pet. App. 3, ¶ 12). At the time of the hearing on the motion for default judgment, the Assistant Attorney General represented to the court and counsel for Respondent that the whereabouts of the two individuals who had signed for Respondent's property, Mr. Kosta and Mr. Gero, was unknown.

SUMMARY OF THE ARGUMENT

In order for a plaintiff to recover under § 1983 he need establish only the violation of a constitutional right which he was subjected to by the defendant acting under color of state law. Petitioners concede that the Respondent was entitled to his property which had been placed in their hands, that they are unable to return it, and that their actions were taken under color of state law. Respondent is therefore entitled to recover for his loss under § 1983.

The purpose of § 1983 is to reach official misconduct. The legislative history indicates that Congress was concerned with compensating individuals whose rights had been violated. However, this Court has concluded that Congress did not intend to do away with the then recognized common law immunities. This Court has therefore constructed a set of qualified immunities adapted to particular situations, but always founded upon tort law principles. Underlying this system of immunities is the assumption that but for these immunities the defendants could be liable. Since these immunities are in turn based upon the reasonableness of the defendants' briefs, negligent conduct can cause defendants to lose their qualified immunity. Thus public officials who deprive individuals of their constitutional rights either unintentionally or through negligence can be held liable in some instances.

The existence of a state tort claims act does not excuse the Petitioners' actions which deprived the Respondent of his property because the act lacks numerous features necessary for due process. In addition, Congress has recently acted to allow for the staying of § 1983 actions by prisoners while their claims are referred to state administrative grievance procedures which the United States Attorney General has certified as complying with minimum standards. The creation of that remedy implies a congressional recognition of the broad spectrum of § 1983 problems, and provides a remedy to *supplement,* but *not replace* the § 1983 federal court remedy.

Finally, the record establishes that the loss of Respondent's property was a foreseeable result of the Petitioners' policies. Since the Petitioners admit receiving the Respondent's materials safely in their custody and have failed to come forward with any explanation of what kind of care they

exercised and how the property was lost or destroyed, the district court was correct in sustaining the Respondent's motion for summary judgment.

ARGUMENT

I.

INTRODUCTION

In order for a plaintiff to successfully set forth a cause of action under §1983, two—and only two—allegations are required. "First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo,* 64 L.Ed.2d 572, 577 (1980). Measured against this standard, it must be concluded that Mr. Taylor has established his right to recover.

"That rights in property are basic civil rights has long been recognized." *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972). Although Mr. Taylor's "rights may be diminished by the needs and exigencies of the institutional environment," *Wolff v. McDonnell,* 418 U.S. 539, 555 (1974), he "may not be deprived of life, liberty, or property without due process of law." *Id.* at 556.

Petitioners admit that Mr. Taylor was entitled to the possession of his property. They contend that they have not "deprived" Mr. Taylor of that federally protected right

within the meaning of § 1983 for five reasons.[3]

First, Petitioners contend that they cannot be held liable under § 1983 for failing to adopt and enforce procedures that would have protected Mr. Taylor's property from loss while in their custody.

Second, they contend that their actions were not the type of official conduct or misconduct which § 1983 was intended to reach.

Third, Petitioners argue that Mr. Taylor has not been deprived of a federally protected property right when there is a theoretical possibility that he might recover damages for his loss in an action against the state.

Fourth, it is urged that the Petitioners' actions were not the legal cause of Respondent's loss.[4]

The following argument will demonstrate that none of the Petitioners' contentions are well founded.

---

[3]Petitioners do not contend that they were not acting under color of state law. Warden Parratt is the chief executive officer of the NPCC. §83-177 *Neb.Rev.Stat.* (Reissue 1976). Among other duties, the warden is charged with seeing that a prisoner is "returned any personal possessions taken from him upon his confinement." §83-187 *Neb.Rev. Stat.* (Reissue 1976). He is also responsible for discipline of inmates. §83-185 *Neb.Rev.Stat.* (Reissue 1976). Defendant Lugenbill is a state employee assigned to the hobby center at the NPCC. (J.A. 16, ¶2A).

[4]Petitioners' fifth contention, that Mr. Taylor's loss was *de minimus* is completely untenable. Since a plaintiff who is able to establish that his due process rights were violated is entitled to nominal damages of $1.00, even if he cannot establish actual damages, *Carey v. Piphus,* 435 U.S. 247 (1978), it is clear that Mr. Taylor who has established actual damages of $23.50, should be entitled to recover his loss. *And see Sniadach v. Family Finance Corp. of Bay View,* 395 U.S. 337 (1969) (Garnishment of $31.59 in wages without notice and an opportunity to be heard violated Due Process Clause). *See Lynch v. Household Finance Corp.,* 405 U.S. 538 (1972).

II.

LIABILITY CAN BE ESTABLISHED UNDER 42 U.S.C. §1983 FOR THE FAILURE TO ENFORCE PROCEDURES TO PROTECT CONSTITUTIONAL RIGHTS.

A. Government Policy or Custom.

The Petitioners' first contention, that the failure to enforce appropriate policies did not "deprive" Mr. Taylor of his federally protected rights within the meaning of §1983, is clearly negated by *Owen v. City of Independence,* 445 U.S. 622 (1980). In this case this Court held that a city employee, discharged without notice of reasons or a hearing in violation of his constitutional rights to procedural and substantive due process, was entitled to recover damages from the city even though he could not recover against the city's officials because they established their right to a qualified good-faith immunity. In so doing, the Court was furthering the two goals of §1983; compensation of injuries and deterrence of future unlawful conduct. The Court merely applied its holding in *Monell v. New York City Dept. of Soc. Serv.,* 436 U.S. 658 (1978) that "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . the government as an entity is responsible under §1983." *Id.* at 694.

The Court in *Owen* concluded that the goal of compensating victims of unconstitutional conduct could only be furthered if cities did not enjoy the qualified immunity to which many of their officials were entitled, for otherwise "many victims of municipal malfeasance would be left

remediless if the city were also allowed to assert a good faith defense." 445 U.S. at 651, Justice Brennan, writing for the majority, went on to observe the municipal liability would also be an effective deterrent against future constitutional deprivations.

> Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. Such procedures are particularly beneficial in preventing those "systemic injuries" that result not so much from the conduct of any single individual, but from the interactive behavior of several governmental officials, each of whom may be acting in good faith.
>
> 445 U.S. at 650.

B. Unintentional Violations.

Without going so far as to say that *Owen* establishes strict liability on the part of a defendant for the violation of an individual's constitutional rights, it is clear from the Court's use of the words "malfeasance" and "unintentional infringements on constitutional rights" that the Court established that a defendant is liable when he violates an individual's constitutional rights unintentionally. Applied to the case at bar, *Owen* establishes that Petitioners can be held liable under §1983 for their failure to enforce regulations that would have protected Mr. Taylor's property.

Such a holding is consistent with this Court's oft-quoted pronouncement that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Monroe v. Pape,* 365 U.S. 167, 187 (1961).

Owen establishes that defendants who fail to enforce the policies designed to protect individuals' constitutional rights are liable under §1983 to individuals who are deprived of their rights because of the defendants' actions. The Court should therefore reject the Petitioners' first contention that they have not deprived Mr. Taylor of a federally protected right.

C. Similar Cases.

Other courts that have considered the issue have reached a similar conclusion.[5] In *Mingo v. Patterson,* 455 F.Supp. 1358 (D.Colo. 1978), the plaintiff alleged, among other things, that the defendants failed to return to him personal property which one of the defendants, a county sheriff, had ordered plaintiff to leave in his care. The property consisted of shirts, pants, books, letters, cups, coffee and other items the total value of which plaintiff estimated at $253.25. The court stated:

> [I]t is now clear that redress of wrongful deprivation of property by persons acting under color of state law are justicable under §1983. *Lynch v. Household Finance,* 405 U.S. 538 (1972). Moreover, a well established body of case law has developed since *Lynch* recognizing that [the] due process clause affords inmates protection against the unjustified misappropriation of personal property by prison officials.
>
> 455 F.Supp. at 1363.

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[5] *Alexanian v. N.Y.S. Urban Development Corp.,* 554 F.2d 15 (5th Cir. 1977) (Allegation that wardens refused to return confiscated items to prisoner upon his release stated cause of action under §1983); *Clayton v. Shaw,* 548 F.2d 1155 (5th Cir. 1977) (Allegation that court clerk refused to return property used as evidence after trial completed states cause of action under §1983); and *Carter v. Estelle,* 519 F.2d 1136 (5th Cir. 1975) (Allegations of wrongful confiscation of prisoner's property states cause of action under §1983).

D. Petitioners' Responsibilities.

Respondent alleged and proved that the Petitioners, after taking his property into their custody, failed to follow the procedures devised in part to protect his property, and that their failure to do so deprived him of his property without due process of law. Further, the stipulated facts support the inference that Petitioner Parratt, as warden of the NPCC failed to supervise adequately the person charged with the enforcement of the minimal procedure enacted to protect property.

Petitioner Lugenbill was directly responsible for hobby material and yet Respondent's hobby material that came to the mail room of the Nebraska Penal and Correctional Complex and then to the hobby room was "lost," stolen, or otherwise disposed of on two different occasions within the span of a few days. Neither of the Petitioners offer any explanation as to why an inmate and an employee were able to receipt for, and apparently walk away with, the Respondent's property while it was within their custody and control. Their explanation of the disappearance of the Respondent's property is that there is no explanation. The action, or lack thereof, of both Petitioners, constitutes a deprivation of Respondent's property without due process of law.

III.

THE PETITIONERS' ACTIONS WERE THE TYPE OF OFFICIAL CONDUCT OR "MISCONDUCT" WHICH 42 U.S.C. § 1983 WAS DESIGNED TO GUARD AGAINST.

Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

Respondent pled and proved the deprivation of a right protected by the Constitution of the United States. The next inquiry thus becomes whether the deprivation is of the kind that is actionable under § 1983.

The inquiry begins with *Monroe v. Pape,* 365 U.S. 167 (1960). From the legislative history which was thoroughly discussed in *Monroe,* from *Monroe* itself, and from the cases decided by this Court since that time, one finds strong support for the proposition that when a state official's actions, pursuant to the objectives of his duties, deprive one of property without due process, his conduct is within the purview of § 1983.

A. Legislative History.

In its analysis of the legislative history underlying § 1983 in *Monroe,* this Court found no intention by the enacting Congress to limit the reach of civil remedies created by

§1983 to conduct by state officials who intentionally infringe upon federally protected rights. The Court, in reviewing the Congressional debates relating to § 1 of the Ku Klux Klan Act, the predecessor of §1983, quoted Senator Edmunds, Chairman of the Senate Committee on the Judiciary:

> The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any state law or under color of any state law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution, *viz.*, the Fourteenth Amendment.
>
> 365 U.S. at 171.

The Court later noted:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.
>
> 365 U.S. at 180.

This Court reviewed the previous cases it had decided interpreting the phrase "under color of" laws and concluded that §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. at 187. It is significant that Justice Frankfurter, the only member of the Court to dissent, agreed with the opinion of the Court that conduct actionable under §1983 was not limited by the mental state of the person alleged to have made the deprivation. Justice Frankfurter also concluded that §1983 "insofar as it creates an action for damages must be read in

light of the familiar basis of tort liability that a man is responsible for the material consequences of his acts." 365 U.S. 207.[6]

B. Qualified Immunities.

In the twenty years following *Monroe*, this Court has constructed an elaborate system of liabilities and immunities based upon the fundamental premise that a man is responsible for the natural consequences of his actions. The Court should not depart from this fundamental tenent of American law in this case.

Every decision of this Court subsequent to *Monroe* that establishes that public officials are entitled to one degree or another of immunity for their actions is based upon the underlying supposition that but for this immunity their liability could have been established. Thus in *Pierson v. Ray*, 386 U.S. 547 (1967), this Court elaborated on *Monroe's* significance for pleading and available defenses. The Court stated as follows:

In rejecting this [under color of state law] argument we

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[6]Further, Justice Frankfurter noted that the specific intent requirement established in *Screws v. United States*, 325 U.S. 91 (1944) was largely a fiction reduced "in practice to mean no more than intent without justification to bring about the circumstances which infringe . . . rights." He then observed that:

> If the courts are to enforce §1979, it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. . . . Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.
>
> 365 U.S. at 207-08.

> in no way intimated that the defense of good faith and probable cause was foreclosed by the statute. We also held that the complaint should not be dismissed for failure to state that the officers had "a specific intent to deprive a person of a federal right," but this holding, which related to requirements of pleading, carried no implications as to which defenses would be available to the police officers. As we went on to say in the same paragraph, § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." 365 U.S. 187. Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause.
>
> We hold that the defense of good faith and probable cause, which the Court of Appeals found available to the officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983.
>
> 386 U.S. at 556-57.

Pierson thus began an unbroken line of cases that this Court has decided since *Monroe* which have consistently resorted to traditional tort law concepts to fashion appropriate qualified immunities. In this instance the Court should similarly look to traditional tort law precepts in evaluating the Petitioners' conduct.

C. Varying Scope.

This Court was again called upon to elaborate upon § 1983 in *Scheuer v. Rhodes,* 416 U.S. 232 (1974). In this action, the plaintiffs alleged that the defendants had " 'intentionally, recklessly, willfully and wantonly caused an unnecessary deployment of the Ohio National Guard on the Kent State campus and, in the same manner, ordered the

Guard members to perform alleged illegal actions which resulted in the death of plaintiffs' decedents." 416 U.S. at 235. Quoting from *Pierson v. Ray, supra,* this Court noted that although the conduct of police officers is judged by the existence of good faith and probable cause, a different standard may be required in other cases.

> In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. . . . In short, since the options which a chief executive and his principal subordinates must consider are far broader and far more subtle than those made by officials with less responsibility, the range of discretion must be comparably broad. . . .
>
> These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all these circumstances, coupled with good-faith belief, that afford the basis for qualified immunity of executive officers for acts performed in the course of official conduct.
>
> 416 U.S. at 246-48.

The Court here constructed the defendants' immunity using the traditional tort law standard of reasonableness which is the foundation of negligence liability. The logical corollary of such an immunity is that good faith founded upon an unreasonably held belief would not exonerate the defendants.

D. No Absolute Immunity.

In *Wood v. Strickland,* 420 U.S. 308 (1975), this Court again declined to hold that public officials were absolutely immune from actions for damages under §1983. The defendants in this case had expelled the plaintiffs from school without due process. This Court reviewed its prior decisions and concluded that a two step process was appropriate in determining the extent of a defendant's immunity.

> The disagreement between the Court of Appeals and the District Court over the immunity standard in this case has been put in terms of an "objective" versus a "subjective" test of good faith. As we see it, the appropriate standard necessarily contains elements of both. The official himself must be acting sincerely and with a belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of §1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. Such a standard neither imposes an unfair burden upon a person assuming a responsible public office requiring a high degree of intelligence and judgment for the proper fulfillment of its duties, nor an unwarranted burden in light of the value which civil rights have in our legal system. Any lesser standard would deny much of the promise of §1983....

> A compensatory award will be appropriate only if a school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his actions cannot be reasonably characterized as being in good faith.
>
> 420 U.S. 321-22.

In the cases subsequent to *Monroe* this Court has developed an elaborate and carefully balanced set of individually determined immunities. They are all based upon the underlying premise that but for the immunity a public official could be liable for constitutional deprivations resulting from his negligent conduct and his immunity can be lost or denied due to his negligence. This Court should continue to shape the appropriate limits of liability and immunity on a case by case basis and reject the Petitioners' contention that the possibility of liability based upon negligent conduct should be precluded in a wholesale fashion.

In the present case, a situation is before the Court wherein the Petitioners, and those under their direction and control, took custody of the Respondent's personal property at a time when Respondent was unable to take possession of it for himself. Obviously, property going into a penal institution must be examined so that the security interests of the institution may be protected, and the responsibility for the protection of this interest rests with Petitioner Parratt. See §83-177 *Neb.Rev.Stat.* (Reissue 1976). But protecting the legitimate interests of the correctional system is not the end of his responsibilities.

E. Prisoners' Rights.

A prisoner is not stripped of all of his constitutional rights when he enters the custody of the state. As this Court noted in *Wolff v. McDonnell,* 418 U.S. 439 (1974) (decided ten months before Respondent's property was improperly disposed of):

> Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a "retraction justified by the considerations underlying our penal system." [citations omitted]. But though his rights may be diminished by the needs and exigencies of the constitutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisoners of this country.... Prisoners may also claim the protections of the Due Process Clause. They may not be deprived of life, liberty or property without due process of law.
>
> 418 U.S. at 555-56.

This Court then continued to analyze "good time" and how it fits within the concept of "liberty" protected by the Due Process Clause. The Court then stated:

> This analysis as to liberty parallels the accepted due process analysis as to property. The Court has consistently held that some kind of hearing is required at some time before a person is finally deprived of his property interests.... The requirement for some kind of a hearing applies to the taking of private property.
>
> 418 U.S. 557-58.

Under the present set of facts a preloss hearing was not possible, but what was possible was that the Petitioners ensure that the regulations which had been promulgated to protect inmate property be followed. Their failure to do so resulted in Respondent's property being improperly disposed of in violation of his right to due process of law.

F. Compensation.

Further, Petitioners' assertion that §1983 "was not intended by Congress to penalize negligent conduct" misses the mark. (Petitioners' Brief on the Merits, page 4). Section 1983 was not enacted solely to punish insofar as it compensates citizens who have been deprived of constitutional rights under color of state law. It penalizes only when punitive damages are allowed and this is only in a situation where the wrongful act or conduct is accompanied by aggravating circumstances, such as malice, wantonness or willfulness. *Carey v. Piphus,* 435 U.S. 274 (1978), *Silver v. Cormier,* 529 F.2d 161 (10th Cir. 1976); *Tyrrell v. Taylor,* 394 F.Supp. 9 (E.D.Pa. 1975). Section 1983 was intended to compensate individuals deprived of constitutional rights as well as to ensure future compliance with the Constitution.

IV.

THE MERE EXISTENCE OF A POTENTIAL REMEDY UNDER STATE LAW DOES NOT REHABILITATE A TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW.

A. Similar Contention Rejected.

The Petitioners' third contention is that their actions under color of state law have not deprived a person of protected federal rights within the meaning of §1983 when

state law potentially provides a tort law remedy.[7] This Court has recently rejected a similar contention in *Carlson v. Green,* 446 U.S. 14 (1980), where the defendants, federal officials, contended that the existence of a right of action under the Federal Tort Claims Act ("FTCA") should preclude an implied cause of action under the Eighth Amendment. In rejecting the defendants' contention, this Court first noted that the FTCA contained no exclusive provision declaring it the substitute for an action implied under the Eighth Amendment. 446 U.S. at 19. The Court then went on to list four additional factors suggesting why an implied right of action under the Eighth Amendment would be a more effective remedy for the injuries suffered by the plaintiff than an action under the FTCA. The four reasons were as follows:

1. Since an FTCA action can be brought only against the government, it is not as an effective deterrent against wrongful conduct as a cause of action against individual defendants.
2. The FTCA does not allow the recovery of punitive damages which may be appropriate in some situations involving the deprivation of constitutional rights and which are an even more effective deterrent to future unconstitutional actions.
3. The FTCA does not provide the plaintiff with the right to a jury trial which he would have in an implied cause of action.

---

[7]Petitioners raised this matter for the first time in their Petition for Rehearing before the court of appeals. (R. 13). Respondent points out that it is the Attorney General's office that is charged with the investigation, evaluation and settlement of claims made under the State Act § §81-8,212 and 81-8,218 *Neb.Rev.Stat.* (Reissue 1976). Since the Attorney General's office had actual knowledge of Respondent's claim since the service of his complaint in April of 1976, raising the applicability of the State Act for the first time four years later is disingenuous at best.

4. Liability under FTCA is dependent upon underlying state law and would make the vindication of the violation of an individual's constitutional rights dependent upon the vagaries of the laws of the several states.

446 U.S. at 20-23.

B. State Act Equally Deficient.

Each of the objections set forth in *Carlson* apply with equal force to the argument that Mr. Taylor should be relegated to recovery, if any, under the State Tort Claims Act (the "State Act") for his loss in this case. First, the State Act, like the FTCA, provides only for an action against the state, and not against individual defendants. Sections 81-8,215; 81-8,223 *Neb.Rev.Stat.* (Reissue 1976). Second, like the FTCA, the State Act contains no provision for punitive damages. Third, under the State Act there is no right to a trial by jury, and trial is to the court, just as under the FTCA. §81-8,214 *Neb.Rev.Stat.* (Reissue 1976). Fourth, the existence of a cause of action is dependent both upon underlying state tort law, §81-8,215 *Neb.Rev.Stat.* (Reissue 1976), and upon specific statutory exclusions. §81-8,219 *Neb.Rev.Stat.* (Reissue 1976). Thus, recovery under the State Act is as subject to the variations of state law as is recovery under the FTCA.[8] The reasons set forth in *Carlson*

[8]The State Act contains at least two further disadvantages for a plaintiff. It contains a two year statute of limitations, §81-8,227 *Neb.Rev.Stat.* (Reissue 1976), while federal civil rights actions in Nebraska can be brought within three years. §25-219 *Neb.Rev.Stat.* (Reissue 1979). And attorney's fees under the State Act must be paid out of a plaintiff's recovery, §81-8,228 *Neb.Rev.Stat.* (Reissue 1976), rather than being taxed as costs as allowed by 42 U.S.C. §1988.

for concluding that the existence of a possible cause of action under the FTCA did not preclude a plaintiff from suing on an implied cause of action under the Eighth Amendment are equally compelling in the present case. Further, since *Monroe,* it has been clear that:

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is not barrier to the present suit in the federal court.
>
> *Monroe v. Pape,* 365 U.S. at 183.

There is no reason that this Court should change this long held rule.

C. Congressional Action.

Finally, Congress has acted to deal with the concerns expressed by the petitioners and *amici* that § 1983 actions by prison inmates are becoming unduly burdensome upon the courts and the states. On May 23, 1980, Congress passed the Civil Rights of Institutionalized Persons Act, Pub. L. No. 96-247, 94 Stat. 349. Section 7 of the Act (codified at 42 U.S.C. § 1997e) provides that the Attorney General of the United States shall adopt minimum standards for prison grievance procedures. States may then submit an application to the Attorney General which outlines the procedures available to prisoners with grievances in that state. If these procedures are determined to be adequate, the Attorney General shall then certify that the minimum standards have been met.

Once a state's procedures have been certified, if an adult prison inmate brings a § 1983 action regarding a grievance

that he has related to his confinement, "the court shall, if the court believes that such a requirement would be appropriate and in the interest of justice, continue such a case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy and effective administrative remedies as are available." Pub. L. No. 96-247 § 7(a)(1), 94 Stat. 352.

The legislative history of the Act indicates that Congress intended to speak to the problem of the courts' workloads and the need for administrative solutions to prison grievances.

> Another purpose of the bill is to stimulate the development and implimentations of effective administrative mechanisms for the resolution of grievances in correctional and pretrial detention facilities, and to allow a court to continue a case for a limited period of time when such an effective mechanism exists and use of it would be appropriate and in the interest of justice. The effect of H.R. 10 would be to secure basic legal and constitutional rights for institutionalized persons, and to assist in relieving the case loads of Federal courts in prisoner petitions.

H.R.Conf.Rep. No. 96-897, 96th Cong., 2nd Sess. 9-10, *reprinted in* [1980] *U.S. Code Cong. & Ad. News,* 1998, at 1999-2000.

Proposed minimum standards for inmate grievance procedures and procedures for obtaining certification of them have been promulgated by the Department of Justice. 45 Fed. Reg. 79,095 (1980) (to be codified in 40 C.F.R. Part 40). Where Congress has taken appropriate action to ameliorate the burdensome nature of prisoners' civil rights actions, it would be inappropriate for this Court to place further limits upon such actions, at least without allowing the congressional solution an adequate period to reveal its effectiveness. The Court should, therefore, reject the Peti-

tioners' third contention and conclude that the mere existence of a possibility of recovery under the State Act is not sufficient to vindicate, *ex post facto,* the violation of Mr. Taylor's federally protected property rights.

V.

THE RECORD ESTABLISHES THAT THE PETITIONERS' ACTIONS WERE THE LEGAL CAUSE OF RESPONDENT'S LOSS.

Finally, Petitioners contend that even if Mr. Taylor's complaint is held to state a cause of action under § 1983 for deprivation of federally protected rights and the existence of a possible remedy under the State Act does not rehabilitate, after the fact, the deprivation of Mr. Taylor's rights, the record does not establish that their actions were the legal cause of Mr. Taylor's loss. In other words, Petitioners contend that Respondent's loss is "too remote a consequence of the [defendants'] action to hold them responsible under the federal civil rights law." *Martinez v. California,* 444 U.S. 277, 285 (1980).

A. Nebraska Law.

Under Nebraska law, it is clear that public officials have a legal duty to "exercise reasonable care and diligence for the safekeeping of property within [their] custody." *Nash v. City of North Platte,* 205 Neb. 480, 482, 288 N.W.2d 51, 52 (1980). Furthermore, once a plaintiff has established that his property was lost or destroyed while in the custody of a

public official, the burden of going forward with the evidence to show that the loss occurred in spite of the exercise of due care shifts to the defendant. *Nash v. City of North Platte,* 198 Neb. 623, 255 N.W.2d 52 (1977). Petitioners admitted the receipt of Mr. Taylor's property. They offered no evidence as to the conditions under which it was kept or the degree of care which they exercised. The only evidence in the record establishes that notwithstanding a supposed policy to the contrary, hobby items belonging to Mr. Taylor and stored in the mail room, disappeared. Petitioners offered no explanation, plausible or otherwise, as to what happen to Mr. Taylor's property. Under these conditions, Mr. Taylor's loss was clearly a legally foreseeable result of the Petitioners' conduct and the trial court was, therefore, correct in granting Respondent's Motion for Summary Judgment.

B. Motion for Summary Judgment.

Rule 56(c) of the Federal Rules of Civil Procedure provides in part that:

> the adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if pleadings, . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The district court had before it at the time the Motion for Summary Judgment was ruled on the complaint of the Respondent alleging that he had been deprived of property without due process of law, when on two separate occasions the Petitioners allowed individuals under their directions and control to sign for property in the form of packages in

direct violation of NPCC regulations which required each inmate to sign for his own property. (J.A. 5, Complaint and attached Exhibits). The answer of the Petitioners amounts to a general denial, except that it affirmatively alleges that the two packages in question were actually delivered to the Respondent (J.A. 12, Answer). In addition to the complaint, the court had before it the stipulated testimony of Robert Rybolt, a grievance supervisor at the NPCC, in which it is conceded that the institutional policy was not followed on either of the two occasions in question.

C. Purpose of Policy.

The obvious purpose of the institutional policy of having the inmate receipt for his own property is to avoid the exact situation which occurred in this case. The inmate receipts for, and at the same time, receives physical possession of his property. The institution then has proof that the inmate has actually taken possession of his property. The policy protects the inmate's property from being lost, stolen, maliciously destroyed, converted or victimized by practical joke. In the present situation, the Respondent was in no position to protect his own property. After the property had been ordered, he had been transferred from one part of the complex, where hobby materials were permitted, to another area where hobby materials were not allowed. The record does not reflect the reason for his transfer. While it may be argued the Petitioners need not initiate any policy allowing inmates to order property, once having done so, they should be required to follow the policy created and relied upon by those like Respondent who are unable to protect their own property. Where the record reflects the fact that a prison

regulation, enacted in part ot ensure the safety of inmate property, has been violated on two occasions within a four-day span, one can certainly infer that the requisite supervision needed to ensure that the regulation is followed is not being provided.

CONCLUSION

In conclusion, Mr. Taylor had a federally protected property right in his hobby materials. Petitioners, prison employees acting under color of state law, deprived Mr. Taylor of his federally protected property rights by failing to adopt and enforce procedures that would have protected his property. They are, therefore, responsible under § 1983 for the damages which he suffered. Furthermore, the mere existence of at least a theoretical right of recovery under state tort law does not exonerate the defendants. Finally, the record establishes that the Petitioners' conduct was, as a matter of law, the legal cause of Mr. Taylor's loss.

The Court should, therefore, affirm the district court's decision, upheld by the Court of Appeals, granting the Respondent's Motion for Summary Judgment.[9] However, if the Court should overrule the decision of the lower courts, it

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[9]Respondent was allowed on award of attorney's fees by the district court. Should Respondent prevail in this Court, it is his intention to apply for such additional fees as may be appropriate. *See* 42 U.S.C. § 1988.

should remand this matter for further proceedings consistent with this Court's opinion.

Respectfully submitted,

KEVIN COLLERAN
1900 First National Bank Building
Lincoln, Nebraska 68508
(402) 474-6900

Court-appointed Counsel for Respondent

Of Counsel:
TERRY R. WITTLER

APPENDIX A

EXHAUSTION OF REMEDIES.

(a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulated under subsection (b).

(b)(1) No later than one hundred eighty days after the date of enactment of this Act, the Attorney General shall, after consultation with persons, State and local agencies, and organizations with background and expertise in the area of corrections, promulgate minimum standards for the development and implementation of a plain, speedy, and effective system for the resolution of grievances of adults confined in any jail, prison, or other correctional facility. The Attorney General shall submit such proposed standards for publication in the Federal Register in accordance with section 553 of title 5, United States Code. Such standards

shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards.

(2) The minimum standards shall provide—

(A) for an advisory role for employees and inmates of any jail, prison, or other correctional institution (at the most decentralized level as is reasonably possible), in the formulation, implementation, and operation of the system;

(B) specific maximum time limits for written replies to grievances with reasons thereto at each decision level within the system;

(C) for priority processing of grievances which are of an emergency nature, including matters in which delay would subject the grievant to substantial risk of personal injury or other damages;

(D) for safeguards to avoid reprisals against any grievant or participant in the resolution of a grievance; and

(E) for independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision or direct control of the institution.

(c)(1) The Attorney General shall develop a procedure for the prompt review and certification of systems for the resolution of grievances of adults confined in any jail, prison, or other correctional facility, or pretrial detention facility, to determine if such systems, as voluntarily submitted by the various States and political subdivisions, are in substantial compliance with the minimum standards promulgated under subsection (b).

(2) The Attorney General may suspend or withdraw the certification under paragraph (1) at any time that he has reasonable cause to believe that the grievance procedure is no longer in substantial compliance with the minimum standards promulgated under subsection (b).

(d) The failure of a State to adopt or adhere to an administrative grievance procedure consistent with this section shall not constitute the basis for an action under section 3 or 5 of this Act.

Section 7, Pub. L. No. 96-247, 94 Stat. 349, 352-53 (1980) (codified at 42 U.S.C. §1997e).

APPENDIX B

Facility; chief executive; designation. There shall be in each facility a chief executive officer designated as warden or superintendent and such associated wardens or superintendents as the Director of Correctional Services may determine. The chief executive officer shall be responsible to the director for the custody, control and correctional treatment of persons committed to the department and for the general administration of the facility. Associate wardens or superintendents in each facility shall advise and be responsible to the chief executive officer of the facility and shall have such powers and duties as the chief executive officer may delegate to them in accordance with law or pursuant to the directions of the director.

§83-177 *Neb. Rev. Stat.* (Reissue 1976).

Chief executive officer; responsibilities; duties. (1) The chief executive officer of each facility shall be responsible for the discipline of those persons committed to the Department of Correctional Services who reside therein. No person shall be punished except upon the order of the chief executive officer of the facility; nor shall any punishment be imposed otherwise than in accordance with this section.

§83-185(a) *Neb. Rev. Stat.* (Reissue 1976).

Release of person committed; conditions. (1) When a person committed to the Department of Correctional Services is released from a facility, either on parole or upon final discharge, he shall be returned any personal possessions taken from him upon his confinement, and the chief execu-

tive officer of the facility shall furnish him with clothing appropriate for the season of the year, a transportation ticket to the place where he will reside, if within the continental limits of the United States or if not, the state may purchase transportation to the nearest United States border en route to his residence, and such sum of money as may be prescribed by the regulations of the Department of Correctional Services to enable him to meet his immediate needs. If at the time of his release he is too ill or feeble or otherwise unable to use public means of transportation, the chief executive officer may make special arrangements for his transportation to the place where he will reside.

§83-187(1) *Neb. Rev. Stat.* (Reissue 1976).

No. 79-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,

Petitioners,

—v.—

BERT TAYLOR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

CHARLES S. SIMS
BRUCE J. ENNIS, JR.
Counsel of Record

American Civil Liberties Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amicus Curiae

Of Counsel:

GARY GILDEN
The Dickinson School of Law
Carlisle, Pennsylvania

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INTEREST OF AMICUS CURIAE*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to the protection of the civil rights and liberties of Americans. Since its founding in 1920, one of the constant concerns of the ACLU has been the need to provide adequate legal mechanisms to protect against, and remedy, violations of constitutionally protected rights. Foremost among those mechanisms are the sanctions available under §1983 against those state officials who abuse their office or are indifferent to the rights of those they are supposed to serve.

Amicus has frequently appeared before this Court in support of the historic role of 42 U.S.C. §1983 in remedying violations of federal civil rights, and in deterring

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*Letters of consent from all parties to the filing of this brief are being lodged with the Clerk of the Court.

departure from constitutional standards. We submit this brief amicus curiae to urge the Court to preserve the role of §1983 in enforcing fidelity to the constitutional obligations of state officials entrusted with public power.

INTRODUCTION AND SUMMARY OF ARGUMENT

For the reasons presented in respondent's motion to dismiss the writ as improvidently granted, previously denied at least pending argument by this Court, amicus believes this Court no longer has power under Article III to render a judgment in this case, and there is certainly no need to do so.

Although we do not here brief the issue, we also believe the recent enactment of an administrative exhaustion requirement applicable to cases such as this, 42 U.S.C. §1997e (1980), renders

consideration of this case inappropriate.[1/] Because "a court is to apply the law in effect at the time it renders its decision," Bradley v. School Board of Richmond, 416 U.S. 696, 711 (1974), state authorities should be given the opportunity Congress has now created and defined in §1997e to administratively remedy respondent's loss. This would not only implement the Congressional will, but quite possibly avoid unnecessary constitutional adjudication by obviating the need to decide the Constitutional question whether the facts in respondent's §1983 claim amount to a

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[1/] See generally Brief for the National Prison Project of the American Civil Liberties Union Amicus Curiae in Jenkins v. Brewer, No. 80-546.

Constitutional violation.[2/]

Should the Court reach the merits of this case, however, we believe it should decline to hold that more than "simple negligence," or indeed any state of mind whatsoever, must be proven in all §1983 cases.

A §1983 claim is made out if plaintiff proves that some person deprived him of a federal right, and that the person who has deprived him of a federal right acted under color of law. Gomez v. Toledo, 64 L.Ed.2d 572 (1980). As we have previously urged in briefs relied upon by this Court,[3/] although particular

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[2/] The grievance resolution plan required under §1997e(b) would provide for the resolution of respondent's grievance whether or not the loss of his property rises to the level of a Constitutional deprivation, and regardless of the petitioners' state of mind.

[3/] See briefs for the American Civil Liberties Union Amicus Curiae in Procunier v. Navarette, No. 76-446, and Baker v. McCollan, No. 78-752.

violations of federal rights may themselves require proof of particular states of mind, see, e.g., Estelle v. Gamble, 409 U.S. 27 (1976)(allegation of deliberate indifference necessary in Eighth Amendment medical care case), §1983 itself contains no independent state of mind requirement. Gomez v. Toledo makes clear that the question presented here, "whether simple negligence...may form the basis of a judgment under 42 U.S.C. §1983," is the wrong question. (Point I.)

The legislative history conclusively demonstrates that Congress did not require proof of a state of mind in making out all prima facie §1983 cases. (Point II.) Considerations of policy do not convincingly argue for imparting a state of mind requirement into the §1983 prima facie case beyond its current role in the good faith defense, and §1983 will not

become a generalized tort law in the absence of a state of mind element. (Point III.)

We do not here address the additional question whether respondent has properly pleaded and proven the first element of his §1983 claim, that is, whether petitioners' actions did in fact deprive him of a Constitutional right, a question which, as we have shown, implementation of 42 U.S.C. §1997e would pretermit. We confess to finding that a difficult question. We are certain, however, that if petitioners are to prevail, it should be on that ground, not because some additional state of mind element allegedly required by §1983 itself has not been properly alleged or proven.

I. THIS COURT HAS RECOGNIZED THAT SECTION 1983 DOES NOT REQUIRE PROOF OF DEFENDANT'S STATE-OF-MIND TO ESTABLISH LIABILITY.

Although this Court has held that proof of specific intent is not necessary to state a cause of action under 42 U.S.C. §1983, Monroe v. Pape, 365 U.S. 167, 187 (1961), it has never expressly decided whether negligent conduct is actionable under the statute.[4/] However, in various decisions construing §1983, the Court has set forth the elements of a §1983 action. In none of these decisions has this Court required a party to plead or prove a degree of culpability greater than negligence to state a cause of action under §1983. In fact, this Court's decisions consistently indicate that §1983

[4/] This Court has previously granted certiorari on two occasions to consider the requisite standard of culpability for Section 1983 liability. Baker v. McCollan, 443 U.S. 137 (1979); Procunier v. Navarette, 434 U.S. 555 (1978). However, the Court decided both cases without reaching the issue.

does not require a party to prove any state of mind, so long as the defendant deprived him of constitutional rights. Instead, subject only to a good faith defense, §1983 imposes strict liability for constitutional violations caused by a person acting under color of state law.

Just last term, this Court held that a plaintiff in a §1983 action need not allege that the public official is not entitled to a qualified immunity in order to state a claim for relief. Gomez v. Toledo, 64 L.Ed.2d 572 (1980). In rejecting any requirement that the plaintiff plead the bad faith of the defendant, the Court set forth the two elements of a §1983 action:

> By the plain terms of Section 1983, two - and only two - allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of a federal right acted under color of state or territorial law. 64 L.Ed. 2d at 577.

Earlier decisions of this Court have similarly noted that the only elements of a §1983 action are (1) the deprivation of a federal right, and (2) that the deprivation is caused by a person acting under color of state law. See, e.g., Monroe v. Pape, 365 U.S. 167, 171 (1961)("Allegations of fact constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies...the requirement of RS §1979

[42 U.S.C. §1983]); [5] Douglas v. Jeanette, 319 U.S. 157, 162 (1943)("Allegations of fact sufficient to show deprivation of the right of free speech under the First Amendment are sufficient to establish deprivation of a constitutional right guaranteed by the Fourteenth, and to state a cause of action under the Civil Rights Act, whenever it

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[5] It is noteworthy that the dissenting opinion by Justice Frankfurter in Monroe, 365 U.S. at 202-259, did agree with the majority that conduct actionable under §1983 should not be limited to actions infused by certain mental states. Observing that the specific intent requirement established in Screws v. United States, 325 U.S. 91 (1944) was largely a fiction diluted "in practice to mean no more than intent without justification to bring about the circumstances which infringe...rights," Justice Frankfurter concluded as to this point,

> If the courts are to enforce [§1983], it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation...Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient. Monroe, 365 U.S. at 207-208.

appears that the abridgement of the right is effected under color of a state statute or ordinance.")

In Baker v. McCollan, supra, this Court granted certiorari to determine whether negligent conduct is actionable under §1983. Although the Court did not decide the question, it suggested in dicta that §1983 does not itself impose any state-of-mind prerequisite to liability:

> [W]e have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under §1983...may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of of §1983 action. 443 U.S. at 139.[6/]

[6/] In a subsequent footnote, Justice Rehnquist observed that although §1983 does not appear to require plaintiff to prove defendant acted culpably, "the state-of-mind of the defendant may be relevant on the issue of whether a constitutional violation has occurred in the first place..." 443 U.S. at 140 n.1.

Justice Powell, in his dissent from this Court's recent holding that municipalities are not entitled to a qualified immunity in actions under §1983, Owen v. City of Independence, Missouri, 63 L.Ed.2d 673 (1980), read Owen as deciding that absent a good faith defense, state-of-mind plays no role in §1983 itself.[7/] And the Court itself acknowledged that, apart from the affirmative defense of good faith, §1983 imposes a form of strict liability on "persons" who, acting under color of state law, cause constitutional violations:

[7/] "[T]he Court holds that municipalities are strictly liable for their constitutional torts." 63 L.Ed.2d at 702.

> [A] municipality has no discretion to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a §1983 action, it does not seek to second-guess the "reasonableness' of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to requirements of the Federal Constitution and statutes. 63 L.Ed.2d at 692. 8/

8/ Having struck a balance between the need for vigorous administration of the laws and the need to protect constitutional rights by adopting essentially a negligence standard for the good faith defense for individuals, there is no need, and it makes no sense, to re-import those considerations into plaintiff's prima facie case. Moreover, since the only officials who could be absolved from liability by the good-faith defense are those against whom plaintiffs have made out no more than a case of negligience (if plaintiff has proven malice, he has disproven subjective good faith; if he has proven gross or reckless disregard, he has disproven objective reasonableness), it is apparent that a prima facie §1983 case can be made out even when the deprivation is not more culpable than "negligent".

This is not to say that negligence would be a proper standard for prima facie liability for deprivation of all constitutional rights. Some constitutional rights are defined in terms of a particular mental component. For example, the Eighth Amendment's protection against "cruel and unusual" punishment implies by its terms that a certain mental state is a prerequisite to its violation. Consequently, in Estelle v. Gamble, 429 U.S. 97 (1976), the "infliction of unnecessary suffering" upon prisoners by denial of medical care was held to amount to a violation of the Eighth Amendment, cognizable under §1983, only where such pain was inflicted through "deliberate indifference" to serious medical needs of prisoners. 429 U.S. at 104. On the other hand, because the text of the Fourth Amendment establishes a right to be free from unreasonable searches and seizures, not just from

malicious or reckless ones, this Court has held that in a §1983 action alleging illegal arrest, a plaintiff can get his case to a jury by simply showing that the official's conduct was objectively unreasonable, and not legally excused. See Monroe v. Pape, supra, and Pierson v. Ray, 386 U.S. 547 (1967). In a variety of other cases too, this Court has held the elements of a §1983 action properly pleaded or proven without inquiring into the state-of-mind with which constitutional rights were violated. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964); Goldberg v. Kelly, 397 U.S. 254 (1970); Abington v. Schempp, 374 U.S. 203 (1963); Owen v. City of

Independence, supra.[9/]

II. THE LANGUAGE AND LEGISLATIVE HISTORY OF 42 U.S.C. §1983 CONFIRM THAT THE STATUTE IMPOSES NO CULPABILITY REQUIREMENT.

By its very terms, §1983 imposes no state-of-mind requirement for liability. The statute provides, without qualification, that every person acting under color of state law, who

> subjects or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured....

[9/] We note that state-of-mind will generally enter a §1983 case only once. When violation of a constitutional right does not itself require proof of state-of-mind, state-of-mind is part of defendant's affirmative defense of good faith. Where culpability is part of plaintiff's case, as in Estelle v. Gamble, supra (reckless indifference), successful proof of plaintiff's case will generally be inconsistent, as a matter of law, with the good faith defense.

The language of the statute accurately reflects the intent of the legislature which passed §1 of the Civil Rights Act of 1871, the direct ancestor of 42 U.S.C. §1983. The legislative history plainly indicates that Congress intended §1983 to afford a civil remedy for any and all violations of federally protected rights caused by state actors, without regard to the culpability or state-of-mind of the person who caused the violation. Senator Edmunds, the manager of the bill in the Senate, stated that Section 1 of the Act was "so very simple and really reenacting the Constitution." Cong. Globe, 42d Cong., 1st Sess., 569 (1871)[cited in Monell v. New York City Dept. of Social Services, 436 U.S. 658, 685 (1978)]. Similarly, Representative Bingham declared the bill's purpose to be

> the enforcement...of the Constitution on behalf of every individual citizen of the Republic...to the extent of the rights guaranteed to him by the Constitution." Globe App. 81 [cited in Monell, 436 U.S. 658, 685 n.45].

Representative Dawes, speaking in support of the Act, submitted that Section 1 provides a remedy for any violations of the Constitution, without limitation:

> The rights, privileges, and immunities of the American citizen, secured to him under the Constitution of the United States, are the subject matter of the bill. They are not defined in it, and there is no attempt in it to put limitations upon any of them; but whatever they are, however broad or important, however minute or small, however estimated by the American citizen himself, or by his Legislature, they are in this law....No subject for legislation was ever brought before the American Congress so broad and comprehensive.... Globe at 475 (emphasis supplied).

* * * *

> Whatever they be, he...who invades, trenches upon or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the courts to answer therefor. That covers...all there is in the first sections of this bill.
> Globe at 476.

In remarks cited by this Court in Monroe v. Pape, 365 U.S. 167 (1961), Mr. Arthur plainly indicated that §1 did not insulate negligent actions of state officials. As this Court noted:

> The speaker, Mr. Arthur of Kentucky, had no doubt as to the scope of §1; '[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and immaculate as a seraph, for a mere error in judgment [he is liable]'
> ....
> 365 U.S. 167, 174 n.10 (emphasis in original).

Even the opponents of the Act recognized that it did not require more than proof of a constitutional violation caused by one acting under color of state law. Indeed, one of the bases for opposition to Section 1 was that it imposed liability for any violation of the Constitution without any limitations on such liability. As Senator Thurman, opposing the bill, stated:

> It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrongdoer in the Federal Courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal Courts instead of its being prosecuted as new in the court of the States....

> [T]here is no limitation whatsoever upon the terms that are employed (in the bill), and they are as comprehensive as can be used. Globe App. at 216-217 (emphasis supplied). [Cited in part in Monell, 436 U.S. 658, 685 n.45 and in Monroe, 365 U.S. at 179-80].

Engrafting a state-of-mind requirement upon §1983 would not only be contrary to the terms of the statute and the intent of the legislature; it would violate the legislature's instruction that the statute should be broadly and liberally construed. Representative Shellenbarger expressly described how the courts should interpret §1:

> The act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own

> Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people...Chief Justice Jay and also Story say:
>
> > 'Where a power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.' - 1 Story on Constitution, sec. 429.
> > Globe App., at 68.
> > [Cited in Monell, 436 U.S. at 684.]

This Court has recognized and followed the command of the legislature. As it noted in Gomez v. Toledo, 64 L.Ed.2d at 576-77,

> As remedial legislation, §1983 is to be construed generously to further its primary purpose.

In Monell, this Court relied on the legislature's instruction to broadly construe §1 when it refused to hold that municipalities were excluded from the "persons" covered by the 42 U.S.C. §1983. This Court held that

> absent a clear statement in the legislative history supporting the conclusion §1 was not to apply to the official act of a corporation - which simply is not present - there is no justification for excluding municipalities from the 'persons' covered by §1. Monell, 436 U.S. at 700-701.

There is no clear statement in the legislative history supporting the conclusion that §1 was not to apply to constitutional deprivations unless the violations were caused with a particular evil state-of-mind. Indeed, the clear statement of the legislature is that §1 provides a remedy for any violation of

the Constitution. So far as §1983 itself is concerned, the state-of-mind with which a defendant violated the Constitution, if he did so, is irrelevant. Gomez v. Toledo, supra.

III. EVEN IF THE COURT WERE FREE TO DISREGARD CONGRESSIONAL INTENT, THERE ARE NO POLICY REASONS TO DEPART FROM THE REASONABLENESS STANDARD OF CONDUCT IN FEDERAL CIVIL RIGHTS ACTIONS.

The law of negligence is predicated on the social policy that members of society should be held to an objective standard of reasonable caution concerning the possibility of harming others. Compensatory liability is imposed on persons who harm others while engaged in "conduct which involves an unreasonably great risk of causing damage." W. Prosser, Law of Torts, §31, p.145 (4th Ed. 1971). "The real basis of negligence is not careless-

ness, but behavior which should be recognized as involving unreasonable danger to others." Id. Adoption of a greater-than-negligence standard for actions under §1983 would hold a state officer who engages in conduct involving a risk of causing a deprivation of a citizen's constitutional rights to a lesser objective standard of reasonable caution than that to which the rest of society is held.

There is no valid justification for deterring constitutional violations less vigorously than other harms are deterred. We should expect our state officials to exercise their authority with at least the degree of care as that of a "reasonable" individual in their position and to avoid behavior involving unreasonable danger to others, especially where the officer's actions place a citizen's con-

stitutional rights at risk.[10] Indeed, in light of the substantial and increasing power government officials exercise over individual citizens, the suggestion that the standards set for government officials should be less than those established for

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[10] It has been argued that if state officials may be held personally liable, capable personnel would be deterred from accepting government jobs. The complete response to this argument was set forth in Wright v. McMann, 460 F.2d 126, 135 (2d Cir. 1972):

> We are not moved by the suggestion that if we uphold liability today competent people tomorrow will refuse to become superintendants....In the unlikely event that a prospective superintendant in fact turns down an offer for fear of personal liability, we think that the position is better filled by someone determined to supervise the facility so as to prevent the type of inmate treatment giving rise to this lawsuit.

Establishment of a qualified immunity for state officers whose actions are reasonable is an adequate response to the concern that capable persons will be deterred from accepting government jobs because of the specter of monetary liability. Wood v. Strickland, 420 U.S. 308, 320-21 (1975).

their counterparts in the private sector is astonishing. To permit the guardians of the government's power over individuals to exercise that power without regard to the risks of violation of constitutional rights would invite further deterioration of the fundamental belief that ours is a "wise and frugal government, which shall restrain men from injuring one another, [and] which shall leave them otherwise free to regulate their own pursuits of industry and improvement...." Thomas Jefferson, First Inaugural Address, March 4, 1801.

Nor will failure to insert an independent state-of-mind element in §1983 itself flood the courts with non-essential litigation. In Paul v. Davis, 424 U.S. 693 (1976), this Court expressed its concern that if all injuries inflicted

by a state official were deemed constitutional violations, the federal courts would be overwhelmed with cases that ought to be tried as state law torts. However, the Court did not then and should not now react to that concern by holding that negligent violations of civil rights by state officials can never suffice to state a cause of action under 42 U.S.C. §1983. As illustrated above, there is no support in the text or legislative history of §1983, the Constitution, the prior holdings of this Court, or sound policy for such a holding. Moreover, although a per se rule against "negligence" actions brought under §1983 might seem a convenient means of keeping state court tort actions out of federal courts, the proper application of existing principles of §1983 jurisprudence will necessarily have the same effect.

First, Paul v. Davis itself illustrates how the requirement that the plaintiff be deprived of a federally protected right avoids a wholesale conversion of tort actions into §1983 claims. In Paul, the court inquired whether plaintiff had been deprived of a federally protected right, as §1983 expressly requires, and found that he had not. See also Baker v. McCollan, supra; Martinez v. California, 444 U.S. 277 (1979).

Second, as illustrated supra, focussing properly on §1983's requirement that the deprivation take place "under color of state law" also limits §1983 to its intended purpose, and excludes from federal jurisdiction those tort cases that should properly be litigated only in state courts. The fact that the offender is a state official does not

automatically establish that his acts are necessarily committed "under color of state law." As the court said in Monroe v. Pape:

> The essential element of this type of §1983 action is abuse of his official position. 365 U.S. at 172 (emphasis added).

Finally, careful attention to, and development of, the existing requirement that the risk of injury to a federally protected right be reasonably foreseeable will preclude litigation under §1983 of general state tort law claims, without the necessity of developing a new standard of prima facie liability which would require assessment of a public official's subjective mental state.

CONCLUSION

For the reasons stated in the Introduction, the writ should be dismissed as improvidently granted. In the alternative, for the foregoing reasons, the Court should hold that §1983 does not itself impose on plaintiffs the burden of proving that defendants acted with any particular state-of-mind.

Respectfully submitted,

CHARLES S. SIMS
BRUCE J. ENNIS, JR.
Counsel of Record
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Attorneys for Amicus Curiae

Of Counsel:

GARY GILDEN
The Dickinson School of Law
Carlisle, Pennsylvania

No. 79-1734

IN THE

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OCTOBER TERM, 1980

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FRANCIS LUGENBILL,

Petitioners,

vs.

BERT TAYLOR, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS, EIGHTH CIRCUIT

BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE STATE OF INDIANA, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

FRED E. INBAU, ESQ.
WAYNE W. SCHMIDT, ESQ.
FRANK G. CARRINGTON, JR., ESQ.
JAMES P. MANAK, ESQ.
Americans for Effective Law Enforcement, Inc.,
Suite 207,
501 Grandview Drive,
So. San Francisco, Cal. 94080
Counsel for Amici Curiae

STATE OF INDIANA
by the HON. THEODORE L. SENDAK,
Attorney General of Indiana
Of Counsel

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BRIEF OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE STATE OF INDIANA, AS AMICI CURIAE IN SUPPORT OF THE PETITIONERS

This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by the Hon. Paul L. Douglas, Attorney General of Nebraska, counsel for Petitioners, and by Kevin Colleran, Esq., counsel for the Respondent. Letters of consent of both parties have been filed with the Clerk of this Court. State governments are not required to obtain consent to file as *amicus curiae.*

INTEREST OF THE AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a citizens group, is interested in establishing a body of law making the police and correctional effort more effective, in a constitutional manner.

AELE is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws, its purposes are:

> 1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
>
> 2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law-abiding citizens.
>
> 3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, *AELE* seeks to represent, nationwide, the concern of the average citizen with the problems of crime, police effectiveness to deal with crime, and the effectiveness of correctional administrators in working with prisoners. It also provides legal research assistance in support of responsible law enforcement activities, principally through the *amicus curiae* process in the courts.

The Attorney General of the State of Indiana is an elected and constitutional official and is the chief legal officer of his State. He has specific responsibility for defending civil rights suits brought against State correctional officials.

Our specific interest in this case arises from the importance of effective correctional administration and the adverse impact that an unnecessarily broad interpretation of 42 U.S.C. § 1983 would have on the effectiveness of the states' prison systems. In addition, we are vitally concerned with the potential of abuse in

an increased access to the federal courts, when remedies for the redress of prisoners' grievances are readily available in the state courts. It is our belief that a failure of the Court to reverse the ruling of the Eighth Circuit Court of Appeals will burden prison administrators and other personnel in their vital encounters and relationships with prison inmates. Such a decision is likely to invite prisoners' suits in the federal district courts for the most frivolous and often unfounded grievances. This would cause enormous expenses to the states for legal defenses and put an additional strain on the relations between prisoners and prison employers, rendering the latter less effective in their key roles in the correctional system. Furthermore, it is our concern that the federal courts are ill-equipped to handle the anticipated influx of cases, resulting in the possibility of inattention given to meritorious claims for which these courts have been designed.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

The facts of this case were stipulated in the United States District Court for the District of Nebraska on January 18, 1978, and are as follows:

1. That Robert Rybolt was the Grievance Supervisor at the Reformatory at the time of the incident alleged herein.

2. That plaintiff ordered certain hobby materials from supply houses in California and that for purposes of payment thereof two drafts or checks were issued upon plaintiff's inmate account and accompanied order.

3. That the packages described herein arrived at the Nebraska Penal Complex on or about April 15, 1975, and that said package receipts were signed on or about April 21, 1975, by Mr. Paul Geros and Mr. Chuck Kostos who were assigned to the Prison Hobby Center. At the time the packages arrived at the Institution Mr. Taylor was in the Adjustment Center at the Nebraska Penal Complex.

4. That Mr. Taylor was in Deadlock in the Reformatory at the time he contacted Mr. Rybolt regarding said packages and that Mr. Taylor was not permitted "hobby" at that time and the packages had never been in Mr. Taylor's possession.

5. That Mr. Robert Rybolt was contacted by Mr. Taylor on numerous occasions and that Mr. Rybolt personally searched for said packages after contacting Mr. Francis Lugenbill regarding said packages and that subsequent searches did not turn up said packages.

6. That neither the packages nor the contents of same have ever been turned up.

7. Normal procedure when a package is received at the Institution addressed to an inmate at the Central Mail Room is either that the package is delivered to the inmate's

cell where he signs the package receipt or the inmate is noticed to pick up the package at the hobby center and to personally receipt therefor.

8. Deviations from this practice are made only in exceptional circumstances; and there is no evidence or record of there having been any exceptional circumstances with respect to the packages in question.

9. That it is not Institutional policy for one inmate to sign for another inmate's package because the package receipt is the record of the inmate's receiving the package.

10. There is no record of Mr. Taylor ever receiving said package.

11. Over a considerable period of time plaintiff made numerous inquiries and requested assistance in tracing his packages. None of the efforts of the persons so contacted were productive of any further information regarding the disposition of said packages.

12. Other than the receipts mentioned in paragraph 3 there is no record of the disposition of the packages or the whereabouts of same.

13. That there is no record indicating personal receipt of the packages by Mr. Taylor.

Upon consideration of these facts, the District Court entered summary judgment for plaintiff against the named defendants in the amount of $23.50.

On appeal the judgment of the District Court was summarily affirmed by the United States Court of Appeals for the Eighth Circuit. The defendants' motion for rehearing was denied. Petition for a writ of certiorari was filed by Petitioners to the United States Court of Appeals for the Eighth Circuit, which petition was granted.

ARGUMENT

I.

INTRODUCTION

The argument presented by *amici* focuses on three selected issues raised by this case, providing an analysis of relevant case law and a discussion of policy questions implicated by the issues. *Amici* wish to state that we are in complete accord with the arguments presented by the Petitioners in this case and wish to associate ourselves with and express our complete support for such arguments and points not discussed herein.

II.

SIMPLE NEGLIGENCE IS NOT A CLAIM OF CONSTITUTIONAL SIGNIFICANCE WORTHY OF FEDERAL INTERVENTION UNDER 42 U.S.C. § 1983, CIVIL RIGHTS ACT

In *Procunier* v. *Navarette,* 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed. 2d 24 (1978), this Court specifically left open the question of whether negligent conduct can ever constitute a cause of action under 42 U.S.C. § 1983. Shortly thereafter in *Baker* v. *McCollan,* 443 U.S. 137 at 139, 99 S. Ct. 2689 at 2692, 61 L. Ed. 2d 433, at 439 (1978), this Court stated that the question of whether negligence could be a basis for a § 1983 claim, "may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a § 1983 action." The circumstances of the instant case, however, clearly illustrate the need for a determination of whether a § 1983 claim may be based on simple negligence. The facts of the instant case serve to give clear notice of the types of suits that will be continually brought to the federal courts if this Court rules that simple negligence is an appropriate basis for § 1983 relief.

The lower federal courts have not been consistent in addressing this issue. While they have not defined a standard of negligence which would give § 1983 jurisdiction, the great

majority of cases that have addressed this issue on facts similar to the instant case have rejected claims based on simple or mere negligence. The court in *Leite* v. *City of Providence,* 463 F. Supp. 585 at 589 (D.R.I. 1978), stated: "Despite the statute's potential sweep, numerous courts have limited section 1983 so as not to reach instances of isolated negligent misconduct." *See, e.g., Bonner* v. *Coughlin,* 545 F. 2d 565 (7th Cir. 1976) (*en banc*) (simple negligence not actionable); *Beard* v. *Mitchell,* 604 F. 2d 485 (7th Cir. 1979) (same); *Parker* v. *McKeithen,* 488 F. 2d 553 (5th Cir.) *cert. den.,* 419 U.S. 838, 95 S. Ct. 67, 42 L. Ed 2d 65 (1974) (isolated incident of negligence not sufficient but gross negligence is actionable); *Williams* v. *Vincent,* 508 F. 2d 541 (2nd Cir. 1974) (negligence not actionable); *Howell* v. *Cataldi,* 464 F. 2d 272 (3rd Cir. 1972) (same); *Naughton* v. *Bevilacqua,* 458 F. Supp. 610 (D.R.I. 1978); *Page* v. *Sharpe,* 487 F. 2d 567 (1st Cir. 1973) (mere negligence, in absence of conduct which shocks the conscience, will not suffice); *Ronnei* v. *Butler,* 597 F. 2d 564 (8th Cir. 1979) (negligence or inadvertent conduct not sufficient); *Jones* v. *McElroy,* 429 F. Supp. 848 (E.D. Pa. 1977) (negligence not actionable); *Bogard* v. *Cook,* 586 F. 2d 399 (5th Cir. 1978) (simple negligence not enough to pierce official immunity); *Jones* v. *Diamond,* 594 F. 2d 997 (5th Cir. 1979) (same); and *Schweiker* v. *Gordon,* 442 F. Supp. 1134 (E.D. Pa. 1977) (same).

There can be no question that § 1983 serves a valuable purpose in providing a remedy to those who have been deprived of constitutional rights, privileges, and immunities by abuses of officials acting in their official capacities. But at the same time, the Civil Rights Act is not an appropriate vehicle for the solution of every grievance suffered by prison inmates. In the instant case, the alleged negligence can be no more than an isolated instance of a breach of an established procedure for the receipt of mail. The proper procedure appears to have been

breached, in part at least, because the plaintiff was in disciplinary segregation, and thus had placed himself in a position where he could not personally take possession of the hobby materials. If the warden and hobby manager can be held liable in a § 1983 action under these circumstances, one can only assume that every prison official will be vicariously held to the highest standard of care, even though they had no personal involvement in the facts, and the specific circumstances of the misconduct were beyond their control. Such a rule would subject prison officials to a virtual floodtide of unfounded suits.

In addition, if the Respondent were to prevail in this case, there would be two standards upon which a prisoner could bring a § 1983 suit; one standard for property, that being mere negligence, and another for a prisoner's medical care, that being the standard of deliberate indifference set forth by this Court in *Estelle* v. *Gamble*, 429 U.S. 97, 97 S. Ct. 285, 50 L. Ed 2d 251 (1976). This dichotomous result would require prison officials to exercise a higher standard of care in insuring the integrity of a prisoner's personal property than in the protection of a prisoner's health or life—a novel and totally unsatisfactory outcome.

Beyond the legal significance of these points, *amici* respectfully request that the Court consider the practical impact of holding mere negligence to be a basis for § 1983 suits in terms of the prospective volume of such cases likely to be brought by prisoners. Based on the burgeoning increase over the past decade of civil rights actions filed by state prisoners, a decision by this Court which gives license to prisoners to pursue their most insignificant grievances for the most remote and isolated instances of alleged negligent misconduct, will almost assuredly open the federal courts to a new generation of suffocating civil litigation. At a time when the federal courts are already hearing prisoners' civil rights actions involving seven packages of cigarettes (*Russell* v. *Bodner*, 489 F. 2d 280 (3rd Cir.

1973)); foreign objects in food (*Tuggle* v. *Evans*, 457 F. Supp. 1015 (D. Colo. 1978); and, in the instant case, a hobby set valued at $23.50, there is a compelling need for this Court to define the boundaries of questions of constitutional proportion with particularity and specificity. The setting of a standard higher than simple negligence will serve to allow the federal courts to direct their attention to meritorious claims rather than becoming mired in claims that can only be considered insignificant and frivolous. Surely it is not to be supposed that either the architects of the federal judiciary or the framers of the Civil Rights Act had in mind that the federal district courts were to sit as a small claims court for prison inmates bearing *de minimis* personal property complaints.

III.

REMEDIES FOR VIOLATION OF DUTIES OF CARE ARISING OUT OF TORT LAW SHOULD BE BROUGHT IN STATE COURTS, RATHER THAN IN THE FEDERAL COURTS THROUGH 42 U.S.C. § 1983

An examination of the purposes of § 1983 illustrate again that it should not be applied as a substitute for tort law remedies available in the state courts. In *Stefanelli* v. *Minard*, 342 U.S. 117, 72 S. Ct. 118, 96 L. Ed 138 (1951), this Court held that § 1983 actions were to respect the proper balance between the states and the federal government and that the statute was not to be used in a manner disruptive of proper federal-state comity. Three purposes of § 1983 were set forth in *McNeese* v. *Board of Education*, 373 U.S. 668, 83 S. Ct. 1433, 10 L. Ed 2d 622 (1963): (1) it overrides certain kinds of state laws; (2) it provides a remedy where state law is inadequate; and (3) it provides a federal remedy where the state remedy, though adequate in theory, is not available in practice.

The Respondent has made no showing of the need to invoke § 1983 relief on the basis of any of these purposes. On the contrary, adequate relief is provided for in the state courts.

Such relief is available in both theory and practice. The Respondent seeks to use the federal courts to provide a federal forum for nothing more than his common law tort claim. In *Baker* v. *McCollan, supra,* this Court addressed this concern without equivocation when it stated: "Section 1983 imposes liability for violation of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort law principles." Indeed, a contrary holding would open the federal courts to every manner of tort claim presently cognizable in state courts, including simple negligence involved in the operation of motor vehicles owned by state governmental agencies. These, too, would be brought under 42 U.S.C. § 1983, if the Respondent's position were sustained in the instant case.

This is not to say that an aggrieved prisoner must exhaust his state remedies before seeking recourse in the federal courts. It is, rather, that where there is an adequate state remedy in theory and in fact available to one seeking to redress damage to his or her property because of the alleged simple negligence of state officials, there is no constitutional violation nor deprivation of property without due process requiring the invocation of federal jurisdiction. The availability of the state court forum provides the complete process that is due the prisoner in such negligence claims. In the instant case there, of course, could be no notice and hearing prior to the taking of the hobby materials because there was no intentional taking by the parties. Thus, due process could only be accorded after the loss occurred and that was done in this case by way of the availability of the state forum.

The Respondent may indeed have a valid and proper tort claim in the state court, but has failed to make out a claim of constitutional magnitude. Furthermore, the state courts not only have a more direct interest in this type of claim, but are better able to respond to the volume of such cases.

In a related case involving due process, this Court has stated, "The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States." *Meachum* v. *Fano,* 427 U.S. 215 at 229, 96 S. Ct. 2532, at 2540, 49 L. Ed 2d 451, at 461 (1976).

IV.

WHERE THERE IS NO SHOWING THAT THE NAMED DEFENDANTS WERE DIRECTLY INVOLVED IN THE ALLEGED NEGLIGENT ACTIVITIES, AND THE PROCEDURES ESTABLISHED BY THE PRISON FOR THE RECEIPT OF MAILED MATERIALS WERE NOT FOLLOWED, THE PLAINTIFF HAS FAILED TO ESTABLISH CAUSATION

Respondent seeks to apply a *respondeat superior* theory to the warden and hobby manager to hold them liable in their official capacities. There has been neither an allegation nor a showing that either party had a direct involvement in any misappropriation of the Respondent's hobby materials.

The United States Supreme Court and the lower courts have been consistent in holding that public officials cannot be held liable under § 1983 solely for their failure to exercise proper supervision over subordinates. *See, e.g., Rizzo* v. *Goode,* 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976); *Leite* v. *City of Providence, supra; Owens* v. *Haas,* 456 F. Supp. 1009 (E.D.N.Y. 1978); *Butler* v. *Jenkins,* 450 F. Supp. 574 (E.D. Tenn., N.D. 1978); *Parrilla* v. *Cuyler,* 447 F. Supp. 363 (E.D.Pa. 1978); and *Thornton* v. *Redman,* 435 F. Supp. 876 (D.Del. 1977). Even the Eighth Circuit has ruled in *Cotton* v. *Hutto,* 577 F. 2d 453, 455 (8th Cir. 1978) that the doctrine of *respondeat superior* is not applicable in § 1983 actions.

The absence of direct involvement by the named parties is coupled with the fact that a prison procedure had been adopted for the receipt of mailed materials, but had not been followed in this particular case, through no fault of these named parties. To hold these individuals personally liable would be a radical

departure from the prevailing case law and would impose the strictest possible standard on prison supervisory personnel. The result of such a decision would have the greatest negative impact on the prisoners themselves. Prison administrators would be forced to drastically reduce all privileges which prisoners may now enjoy, because of any potential liability that may be created by a breach in an otherwise well-conceived policy or procedure. Such a rule would adversely impact upon the common interests of prisoners and prison administrators alike.

CONCLUSION

Amici respectfully submit that the decision of the United States Court of Appeals for the Eighth Circuit should be reversed on the law and on the basis of sound judicial policy.

Respectfully submitted,

FRED E. INBAU, ESQ.
WAYNE W. SCHMIDT, ESQ.
FRANK G. CARRINGTON, JR., ESQ.
JAMES P. MANAK, ESQ.
Americans for Effective Law Enforcement, Inc.,
Suite 207,
501 Grandview Drive,
So. San Francisco, Cal. 94080
Counsel for Amici Curiae

STATE OF INDIANA
by the HON. THEODORE L. SENDAK,
Attorney General of Indiana
Of Counsel

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No. 79-1734

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,
Petitioners,

v.

BERT TAYLOR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, COLORADO, CONNECTICUT, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OREGON, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, WEST VIRGINIA and WYOMING, IN SUPPORT OF PETITIONERS, *AMICI CURIAE*

JOHN ASHCROFT
Attorney General of Missouri
PAUL ROBERT OTTO
Assistant Attorney General
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321
Attorneys of Record
JOHN M. MORRIS
Assistant Attorney General
of Counsel

KELLY PRESS, INC., 201 S. Eighth St., Columbia, Missouri Dial 314/449-4163

I.

QUESTION PRESENTED

Whether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. § 1983.[1]

[1]Although other issues are before this Court in the case at bar, this is the only question which will be addressed by the *amici curiae* in this brief.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Nebraska, granting respondent's motion for summary judgment, is unreported and appeared as Appendix B of petitioners' petition for a writ of certiorari. The affirmance of the District Court's opinion by the United States Court of Appeals for the Eighth Circuit is also unreported and appeared as Appendix C of petitioners' petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was filed on January 29, 1980, and petitioners' motion for rehearing was denied by the court on February 29, 1980. The jurisdiction of this court was invoked by petitioners under 28 U.S.C. § 1254(1).

INTEREST OF AMICI CURIAE

The above-listed states, by and through their respective Attorneys General (see Appendix), respectfully offer the present brief as *amici curiae,* in support of the position of the petitioners in this cause. As the chief legal officers for their states, it is the duty of the Attorneys General to defend suits under 42 U.S.C. § 1983 against state officials and employees. For this reason, the *amici* have a substantial and continuing interest in cases such as that at bar which interpret 42 U.S.C. § 1983.

CONSTITUTIONAL PROVISIONS AND STATUTES

1. 42 U.S.C. § 1983 reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

2. Fourteenth Amendment, United States Constitution reads as follows:

"Section 1. All persons born or naturalized in the

United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This action was brought in the United States District Court for the District of Nebraska under 42 U.S.C. § 1983, by a prisoner of the State of Nebraska to recover the value of certain hobby materials lost while they were being stored for the prisoner (Taylor) at the Nebraska Penal and Correctional Complex (NPCC), Lincoln, Nebraska. Named as defendants were Robert F. Parratt, Warden of NPCC and Francis Lugenbill, Hobby Manager at NPCC. The materials in question here were valued at $23.50. The case was submitted to the district court upon the plaintiff's motion for summary judgment and a stipulation of facts.

The hobby materials were mail-ordered by the prisoner in accordance with NPCC procedures. However, when the materials arrived at NPCC the plaintiff had been placed in disciplinary segregation (Adjustment Center) and was not entitled to receive them. The materials were receipted into the institution by an inmate hobby clerk and a civilian hobby counter employee. Neither the inmate hobby clerk nor the civilian employee were named as defendants in this case.

After being receipted into NPCC the materials were stored at the hobby center until Taylor was entitled to take possession of them. When Taylor attempted to claim the goods they could not be located.

The district court, upon consideration of the stipulated set of facts, entered summary judgment for the plaintiff against defendants Parratt and Lugenbill in the amount of $23.50. The district court, in its Memorandum Opinion, specifically held that "negligence can form the foundation for an action under section 1983." Having made that determination, the district court then entered a personal judgment against these two defendants although neither the record in this case nor the district court's opinion reflect any direct involvement in this matter by either defendant.

On appeal to the United States Court of Appeals for the Eighth Circuit, the judgment of the district court was summarily affirmed, and the defendants' motion for rehearing was denied.

SUMMARY OF ARGUMENT

It is the position of the *amici curiae* that acts of simple negligence by persons acting under color of state law do not constitute grounds for relief under 42 U.S.C. § 1983. This position is supported by the legislative history of § 1983, the recent decisions of this Court, and a substantial majority of the decisions in the lower federal courts.

To interpret § 1983 as applying to merely negligent acts, as opposed to intentional or wanton constitutional abuses, serves to upset the balance between the roles of state and federal courts by subsuming the body of state tort law within the federal system, encourages a glut of § 1983 suits, and does so without significantly furthering the policies underlying this statute. Because of the long-standing confusion among the judicial circuits on this issue, this Court should make a dispositive ruling on this question in the case at bar.

ARGUMENT

The sole question to be addressed in this brief is whether acts of simple negligence on the part of a person acting under color of state law may constitute grounds for relief under 42 U.S.C. § 1983. It is the position of the *amici curiae* that simple negligence, as distinguished from such standards of conduct as gross negligence and "deliberate indifference,"[2] does not and should not state a cause of action under § 1983, and that the case at bar presents both an opportunity and compelling support for a dispositive ruling to this effect.

I. The Current State of the Law

A. Legislative History

"Any analysis of the purposes and scope of § 1983 must take cognizance of the events and passions of the time at which it was enacted." *District of Columbia* v. *Carter,* 409 U.S. 418, 425 (1973). This statute, which was passed as the first section of the Civil Rights Act of 1871,[3] was drafted and enacted at the time of incipient anarchy and racial violence in parts of the South, and particularly in response to outrages perpetrated by the Ku Klux Klan; indeed, this enactment was generally known as the "Ku Klux Klan Act." See *Monroe* v. *Pape,* 365 U.S. 167, 171-180 (1961); *District of Columbia* v. *Carter, supra,* at 425-426. It is universally recognized that the controlling concern of this act's proponents was the inaction of state and local governments in controlling or deterring violence by the Klan and its sympathizers. As stated by Senator Pratt of Indiana during the debate on this legislation,

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[2]*Estelle* v. *Gamble,* 429 U.S. 97 (1976). This brief will not address the question of whether "gross negligence" is an appropriate basis for relief under § 1983.

[3]Ch. 22, 17 Stat. 13.

> "[O]f the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the doors of her temples."[4]

See also *Monroe* v. *Pape, supra,* at 175-176. As one commentator has noted,

> "The debates thus lay bare the background of the bill: Outlaws whipping, robbing and murdering with the tacit complicity (if not the active conspiracy) of those responsible for the enforcement of local police regulations."[5]

Thus, the conduct for which the Civil Rights Act of 1871 was intended to provide a remedy was *intentional conduct,* of the type classifiable either as crimes or intentional torts, which resulted in a deprivation of rights under the fourteenth amendment. Although some opponents of the Act expressed concern that the section now known as § 1983 might be read broadly to hold law enforcement officials liable "for a mere error in judgment,"[6] there is no indication whatever that the proponents of this section intended its application to other than intentional acts. Accordingly, it is clear that the legislative history of § 1983 does not support its use in cases involving or alleging mere negligence.

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[4]Cong. Globe, 42nd Cong., 1st Sess., at 317. For discussion of Klan violence, see *Id.* at 155-160, 320-322, 487.

[5]Shapo, "Constitutional Tort: *Monroe* v. *Pape* and Beyond," 60 Northwestern Univ.L.Rev. 277, 281 (1965).

[6]Cong. Globe, 42nd Cong., 1st Sess., at 365 (remarks of Rep. Arthur).

B. The Decisions of this Court

Although this Court has declined on at least two recent occasions to definitively rule upon the issue at bar,[7] the *amici* respectfully submit that the trend of decisions in this Court supports their view that allegations of simple negligence do not state a cause of action under 42 U.S.C. § 1983. This conclusion may be reached independently from two separate lines of decisions promulgated by this Court. The first such line of decisions are cases wherein this Court has indicated in various ways and to various degrees that negligence is a singularly inappropriate basis for § 1983 relief. In *Rizzo* v. *Goode,* 423 U.S. 362 (1976), the plaintiffs sought injunctive relief against the Philadelphia Mayor and supervisory police personnel on the theory that these officials had and violated a constitutional "duty" to eliminate police misconduct. In holding that relief was inappropriate, this Court stated that proof of a pattern of police misconduct was insufficient under § 1983; rather, it must be additionally shown that such misconduct was the result of a *deliberate policy* of the supervisory officials or flowed from an *intentional effort* to violate constitutional rights, citing language to this effect in *Allee* v. *Medrano,* 416 U.S. 802 (1974); and *Hague* v. *CIO,* 307 U.S. 496 (1939). *Rizzo* v. *Goode, supra,* at 374-375. Thus, it was held, "petitioners' *failure* to act in the face of a statistical pattern" (emphasis in original) did not constitute grounds for relief. By this holding, it would seem that this Court implicitly endorsed, at least in some subject-matter areas, the view urged by the *amici* herein.

A somewhat more definite statement on this matter came two months after *Rizzo,* in *Paul* v. *Davis,* 424 U.S. 693 (1976), wherein a plaintiff sought § 1983 relief for being placed on a published list of "active shoplifters"

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[7] *Baker* v. *McCollan,* 443 U.S. 137 (1979); *Procunier* v. *Navarette,* 434 U.S. 555 (1978).

shortly after his shoplifting charge had been dismissed. This Court held that the plaintiff's allegation, essentially a defamation claim, did not constitute a cause of action under § 1983, noting that the fourteenth amendment was not intended as "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.* at 701. In dicta, concern was expressed that adopting the contrary view would mean, for example, that "survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle would . . . have claims equally cognizable under 1983." *Id.* at 698. By these statements, it would appear that this Court again recognized in *Paul* the undesirability of premising § 1983 liability on mere negligence.[8]

The last decision of this Court speaking directly to the negligence issue is *Estelle* v. *Gamble, supra,* in which it was held that allegations of negligence in the medical treatment of prisoners state at most a cause of action for malpractice cognizable in state courts and is not sufficient for a claim under § 1983. *Id.* at 107. The Court continued as follows:

> "We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment. . . . Regardless of how evidenced, deliberate indifference to a prison-

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[8]A reading of the dissenting opinion of Justice Brennan in *Paul* supports a conclusion that the dissent did not disagree with this aspect of the majority opinion; this dissent notes that "[t]he essential element of this type of § 1983 action is [an official's] *abuse of his official position*" (emphasis in original), citing *Monroe* v. *Pape, supra. Paul* v. *Davis, supra,* at 717. Clearly, to speak of "abuse" and "misuse of power" (*Id.* at 717) as essential elements of § 1983 is to exclude matters of negligence as grounds for relief. See the discussion of *Monroe* v. *Pape, infra.*

> er's serious illness or injury states a cause of action under § 1983. (citations omitted). *Id.* at 105-106.

Limited though this holding is to the subject of inmate medical treatment, the *amici* submit that it continues the trend of this Court's recent decisions toward a holding that more than simple negligence is required under 42 U.S.C. § 1983.

A second line of cases supporting the position of the *amici curiae* are those decisions which hold that a public official has a qualified immunity from damages in § 1983 actions when he acts in the good-faith belief that his conduct is constitutional. *Pierson* v. *Ray,* 386 U.S. 547 (1967); *Wood* v. *Strickland,* 420 U.S. 308 (1975); *Procunier* v. *Navarette, supra.* Under these cases, the qualified immunity is breached only where the public official acted either with "malicious intent" to cause a constitutional deprivation or in disregard of "clearly established" constitutional rights of which he knew or reasonably should have known. *Wood* v. *Strickland, supra,* at 322. Clearly, the assertion of a subjective "good faith" standard is addressed solely to intentional conduct or deliberate omission. Moreover, the objective aspect of this test (that the official act pursuant to a reasonable belief in order to assert good faith) is also inconsistent with the concept of negligence, which by definition is unreasonable behavior because "[i]n the light of the recognizable risk, the conduct, to be negligent, must be unreasonable. . . ." Prosser, *Law of Torts,* at 146 (4th ed. 1971).

The sole authority cited by the District Court below for its holding that mere negligence was sufficient to state a claim under § 1983, *Monroe* v. *Pape, supra,* does not support that court's conclusion. In *Monroe,* this Court dispensed with any requirement that the person being sued have a *specific* intent to violate the plaintiff's constitu-

tional rights, but a review of that case makes clear that the Court did not eliminate the need to show that the conduct engaged in was intentional. In stating that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions," *Id.* at 187, *Monroe* was referring to its own facts showing intentional conduct by police officers which was so flagrant that they were bound to know that it would, as a "natural consequence," deprive plaintiffs of their constitutional rights.[9] This context of the above-quoted statement is made even clearer by the Court's statement that the enactment of § 1983 was designed to remedy the denial of constitutional rights "by an official's abuse of his position." *Id.* at 172. It is difficult to perceive an *abuse* of office as being anything other than intentional conduct. If so interpreted, *Monroe* is entirely consistent with this Court's present standard of good-faith immunity—that public officials are liable under § 1983 only if they act either with malicious intent or with deliberate indifference to clearly established rights of which they knew or clearly should have known. *Wood* v. *Strickland, supra.* Negligent conduct is not within such a formulation.

C. Decisions of the Lower Courts

"While most courts have been willing to allow section 1983 liability for gross negligence and deliberate indifference, there has been great reluctance to recognize simple negligence as a basis for a section 1983 claim."[10] Thus, decisions of virtually all judicial circuits support the position of the *amici curiae. Harper* v. *Cserr,* 544 F.2d 1121, 1124 (n.1) (1st Cir. 1976); *Williams* v. *Vincent,* 508 F.2d 541, 546 (2nd Cir. 1974); *Hampton* v. *Holmesburg Prison*

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[9]See McCormack, "Federalism and Section 1983," 60 Va.L.Rev. 1, 54-55 (1974).

[10]Kirkpatrick, "Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement", 46 Cinn.L.Rev. 45, 59 (1977).

Officials, 546 F.2d 1077, 1080-1082 (3rd Cir. 1976); *Jenkins* v. *Averett,* 424 F.2d 1228, 1232 (4th Cir. 1970); *Bogard* v. *Cook,* 586 F.2d 399, 411-412 (5th Cir. 1978), *cert. denied* 100 S.Ct. 173 (1979); *Bonner* v. *Coughlin,* 545 F.2d 565, 566-569 (7th Cir. 1976), *cert. denied,* 435 U.S. 932 (1977); *Williams* v. *Field,* 416 F.2d 483, 485 (9th Cir. 1969), *cert. denied* 397 U.S. 1016 (1970); *McClelland* v. *Faceteau,* 610 F.2d 693, 696 (10th Cir. 1979); see also *Harvey* v. *Clay County Sheriff's Dept.,* 473 F.Supp. 741, 746 (W.D. Mo. 1979); *Schweiker* v. *Gordon,* 442 F.Supp. 1134, 1138-1139 (E.D. Pa. 1977); *Vun Cannon* v. *Breed,* 391 F.Supp. 1371, 1375 (N.D. Cal 1975).[11] *Contra: Howell* v. *Cataldi,* 464 F.2d 272, 279 (3rd Cir. 1972); *Parker* v. *McKeithen,* 488 F.2d 553, 556 (n.6) (5th Cir. 1974), *cert. denied* 419 U.S. 838 (1974); *Puckett* v. *Cox,* 456 F.2d 233, 234-235 (6th Cir. 1972); *Navarette* v. *Enomoto,* 536 F.2d 277, 281-282 (9th Cir. 1976), *reversed on other grounds sub nom. Procunier* v. *Navarette,* 434 U.S. 555 (1978), *on remand* 581 F.2d 202 (1978). The rationale generally discernible from these cases is that, as stated by this Court in *Paul* v. *Davis, supra,* § 1983 was not intended to replicate the whole of state tort law, but to remedy "abuses" by public officials and employees which might not be adequately remedied by the states. See *Harper* v. *Cserr, supra,* at 1124; *Bonner* v. *Coughlin, supra,* at 566-569. This rationale reflects the view of the *amici.*

II. Policy Considerations

As shown above, the legislative history of § 1983 and the clear trend of decisions supports the view that acts of simple negligence do not constitute grounds for relief under that statute, although this Court has so far declined

[11]It should be noted that, prior to the affirmance of the District Court opinion at bar, even the Eighth Circuit expressed misgivings about applying § 1983 as a remedy for acts of simple negligence. *Brown* v. *United States,* 486 F.2d 284, 287 (8th Cir. 1973).

to definitively rule to this effect. The *amici* would offer the following grounds in support of such a holding in the case at bar.

The clearest basis for the holding advocated by the amici rests in the principles of federalism and the relative powers and roles of the state and federal courts. As has been noted by this Court, § 1983 was not designed to be and should not be "a font of tort law" which swallows up the long-standing and thoroughly developed state legal systems of tort liability. *Paul* v. *Davis, supra,* at 701. To use § 1983 as a remedy for merely negligent acts, as compared to deliberate or wanton "abuses" by persons acting under color of state law, not only ignores this statute's intended function but ensures that any individual with a self-perceived grievance, no matter how accidental or trivial (so long as it may be denoted a violation of "due process"), may bypass the state courts and file his suit in the federal system. Not only does such an interpretation encourage a glut of § 1983 claims in the federal courts[12] (and a corresponding derogation of the state forum), but it does so utterly without the justification which originally supported this statute: it has not been contended, and it would be preposterous to allege, that state tort remedies are insufficient or that they are unavailable to persons alleging negligence by state officials or employees.

Nor may it be contended that including negligent acts within the § 1983 remedy significantly furthers the policies of that legislation. As made clear by the legislative history of and subsequent decisions regarding § 1983, it was pri-

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[12]In 1960, at the time of *Monroe* v. *Pape, supra,* only around 300 suits were filed under the general heading of civil rights; in 1974, some 8,000 such cases were filed. McCormack, *supra* at note 9, at 1. Clearly, the ability to recover attorney's fees under 42 U.S.C. § 1988 if they prevail has been and remains a strong incentive for litigants to bypass the state forum.

marily designed to deter abuses of constitutional rights by persons acting in the name of the state, when the deterrence of state law was insufficient or unused. While this statute continues to perform its deterrent function with regard to intentional or even gross and wanton misconduct, how can it be said to significantly "deter" acts of mere negligence? Permitting "civil rights" actions under § 1983 to go forward seeking money damages for negligent conduct against underpaid prison guards and administrators will not achieve penal reform. It may even have a reverse effect: capable personnel may leave or be discouraged from entering the correctional service.[13] As aptly observed in *Jenkins* v. *Meyers,* 338 F.Supp. 383 (N.D.Ill. 1972), *aff'd* 481 F.2d 1406 (7th Cir. 1973),

> "to apply the tort law en masse to § 1983 [by holding the defendant liable for an act of mere negligence] cannot meet with success. To do so would convert every minor mistake, especially in the milieu of the prison, into a violation of § 1983. To hold prison officials to such a high standard of strict liability would impose such an impossible burden as to render prisons totally inoperable." *Id.,* 338 F.Supp. at 390.

Finally, the *amici* would urge a holding by this Court that mere negligence does not constitute a § 1983 claim because of the existing confusion on this matter in the federal judicial circuits and district courts. To appreciate this confusion and its invidious effects, one need only consider that the allegations of respondent in the case at bar (that his hobby kit was negligently lost through the fault of petitioners) would state a cause of action in Missouri, as part of the Eighth Circuit subject to that court's decision at bar; would not state a cause of action in Illinois (*Bonner* v. *Coughlin, supra*); and would state a cause

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[13]Aldisert, "Judicial Expansion of Federal Jurisdiction," 1973 Law and Soc. O. 557, 565-566.

in the contiguous state of Kentucky (*Puckett* v. *Cox, supra*). This sort of confusion regarding a major issue in the application of § 1983 is undesirable and calls out for a resolution by this Court.

It has been argued by those in opposition to the position advanced by the *amici,* as well as those having concerns regarding any sweeping rules on this issue, that it is unreasonable to set a common standard of culpability for the many and varied constitutional rights and factual situations which might be involved in § 1983 litigation. It must be emphasized that *it is not the intent of the amici curiae to propose such a common standard.* Rather, it is respectfully submitted that mere negligence is never under any circumstances an appropriate basis for relief under § 1983, and that the exclusion of this standard from the range of those employed in § 1983 litigation will work no injustice and will serve to eliminate such relatively trivial lawsuits such as that at bar from the federal dockets.

CONCLUSION

In view of the foregoing, the *amici curiae* respectfully submit that the present cause should be reversed on the ground that allegations of mere negligence do not state a cause of action under 42 U.S.C. § 1983.

Respectfully submitted,

JOHN ASHCROFT
Attorney General of Missouri

PAUL ROBERT OTTO
Assistant Attorney General

P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

JOHN M. MORRIS
Assistant Attorney General
of Counsel

On Behalf of the Amici Curiae

APPENDIX: LIST OF THE AMICI CURIAE

State of Arizona

Robert K. Corbin
Attorney General of Arizona
1700 West Washington
Phoenix, Arizona 85007

State of Colorado

J.D. McFarlane
Attorney General of Colorado
1525 Sherman Street,
Third Floor
Denver, Colorado 80203

State of Connecticut

Carl R. Ajello
Attorney General of
Connecticut
Capitol Annex,
30 Trinity Street
Hartford, Connecticut 06115

State of Idaho

David H. Leroy
Attorney General of Idaho
State House
Boise, Idaho 83720

State of Illinois

Tyrone C. Fahner
Attorney General of Illinois
500 South Second Street
Springfield, Illinois 62701

State of Indiana

Theodore L. Sendak
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

State of Iowa

Thomas J. Miller
Attorney General of Iowa
Hoover Building, Second Floor
Des Moines, Iowa 50319

State of Kansas

Robert T. Stephan
Attorney General of Kansas
Judicial Center, Second Floor
Topeka, Kansas 66612

State of Mississippi

William A. Allain
Attorney General of
Mississippi
Carroll Gartin Justice Bldg.
P. O. Box 220
Jackson, Mississippi 39205

State of Missouri

John Ashcroft
Attorney General of Missouri
P. O. Box 899
Jefferson City, Missouri 65102

State of New Hampshire

Gregory H. Smith
Acting Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire
03301

State of New York

Robert Abrams
Attorney General of New York
State Capitol
Albany, New York 12224

State of North Carolina

Rufus L. Edmisten
Attorney General of
North Carolina
Department of Justice
P. O. Box 629
Raleigh, North Carolina 27602

State of North Dakota

Allen I. Olson
Attorney General of
North Dakota
State Capitol
Bismarck, North Dakota 58505

State of Ohio

William J. Brown
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

State of Oregon

James M. Brown
Attorney General of Oregon
100 State Office Bldg.
Salem, Oregon 97310

State of Pennsylvania

Harvey Bartle, III
Attorney General of
Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, Pennsylvania
17120

State of South Carolina

Daniel R. McLeod
Attorney General of
South Carolina
Wade Hampton Office Bldg.
Columbia, South Carolina
29211

State of South Dakota

Mark V. Meierhenry
Attorney General of
South Dakota
State Capitol Bldg.
Pierre, South Dakota 57501

State of Tennessee

William M. Leech, Jr.
Attorney General of
Tennessee
450 James Robertson
Parkway
Nashville, Tennessee 37219

State of West Virginia

Chauncey H. Browning
Attorney General of
West Virginia
State Capitol
Charleston, West Virginia
25305

State of Wyoming

John D. Troughton
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82202

ADDENDUM TO APPENDIX

Please note that the following states should be added to the list of the *amici curiae* contained in the Appendix to the printed brief:

State of Michigan

Frank J. Kelley
Attorney General of Michigan
Law Building
Lansing, Michigan 48913

State of Minnesota

Warren R. Spannaus
Attorney General of Minnesota
102 State Capitol
St. Paul, Minnesota 55155

State of Utah

Robert B. Hansen
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114

MICHAEL RODAK, JR., CL

No. 79-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT PARRATT AND FRANCES LUGENBILL, *Petitioners,*

v.

BERT TAYLOR, JR., *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE STATE OF HAWAII AMICUS CURIAE IN SUPPORT OF PETITIONERS

WAYNE MINAMI
Attorney General of Hawaii

JAMES H. DANNENBERG
Deputy Attorney General Of Hawaii
Counsel Of Record

Department Of The Attorney General
Hawaii State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Attorneys For Amicus Curiae

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BRIEF OF THE STATE OF HAWAII AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The State of Hawaii, by Wayne Minami, Attorney General, and James H. Dannenberg, Deputy Attorney General, submits this *amicus curiae* brief in support of the Petitioners in the above-entitled cause, pursuant to Rule 42(4) of the Rules of the Supreme Court. The State of Hawaii believes that, for the reasons stated herein, this Court should reverse the judgment of the Court of Appeals.

The facts presented in this case are deceptively simple. Because of the arguably negligent conduct of prison officials,

a Nebraska inmate failed to receive a $23.57 hobby kit ordered prepaid by mail; he was authorized to receive the kit, but it was lost or stolen after officials, in violation of their own policies, allowed another inmate to receive and sign for it. The inmate then filed this action pursuant to 42 U.S.C. §1983 on grounds that he was denied property by state officials without due process of law.

These facts, however uncomplicated they may be, frame at least two issues of profound and perplexing sublety, both of which are of interest to the State of Hawaii and to the states in general: 1) the extent of interplay between Constitutional and tort doctrines, especially whether simple negligence may form the basis of a judgment under §1983; and 2) the possibility that extant state tort remedies may, at least in certain circumstances, be sufficient to satisfy procedural due process requirements under the Fourteenth Amendment.

The impact of these issues upon the states, as well as the federal courts, is significant. It is no exaggeration to say that in the two decades since this Court handed down its watershed decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), there has been an explosion of §1983 suits filed in the District Courts. State prisoner suits in 1980 accounted for half of all civil rights filings. The increase in such suits in recent years has been great: in 1966, the first year in which such statistics were kept, there were 218 filings; in 1980 there were 12,397, an increase of over 5,500 per cent.[1] In 1977 these cases accounted for 6.5 per cent of total civil filings; by 1980, the percentage had increased to 7%.[2]

That this volume of cases has made its impact on the federal court system is clear, although the magnitude of the

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[1] See, Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harvard Law Review 610 (1979); Administrative Office of the United States Courts, 1980 Annual Report of the Director.

[2] 1980 Annual Report, tables 19, 21, 28.

impact is less certain. The burden of numbers alone is subject to varying interpretations. One commentator has stated:

> The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate. The burden is relatively light because such a large proportion of the cases are screened out and summarily dismissed before they get underway, because court appearances and trials are rare, and because prisoner cases are not particularly complex as compared to other types of federal litigation.[3]

Yet he went on to say:

> On the other hand, pro se litigation is undoubtedly a problem for judicial administration. The burden on the court is mainly in screening such pro se cases, not in trying them. Relatively few prison cases can be settled, primarily because meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible. Thus unlike other civil litigation, some court action is required on almost all the cases. The court action occurs in the initial section 1915(d) review, on a defendant's motion to dismiss or for summary judgment, or on a periodic house cleaning when old cases are dismissed for lack of prosecution.[4]

The major problem, of course, is sorting the relatively few meritorious claims from the large number of meritless ones. The proliferation of suits, by virtue of mere volume, may tax the ability to screen effectively, and there is always a danger that valid claims may not be acted upon.[5]

The burden of prisoner civil rights litigation weighs heavily upon the states as well, both in terms of increased pressures

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[3] *Turner, supra* at 637.

[4] *Id.* at 637-638

[5] See, e.g. *Watson* v. *Ault*, 525 F.2d 886, 890 (CA 5, 1976), discussing the difficulty encountered attempting "to winnow out the wheat from the unusual amount of chaff." See also Prisoner Civil Rights Committee, Federal Judicial Center, *Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts* (1977).

on state attorney general offices and in terms of the added demands on the time of prison officials. These considerations may not by themselves justify arbitrary and artificial limitations upon civil rights litigation, but they constitute the context in which the states' arguments regarding the present case are made.

Your amicus believes that the trend in this area has been to expand the bases of liability, in spite of recent rulings.[6] Much of this expansion has taken place in the lower courts, primarily because this court has not yet ruled definitively on the issues raised in the instant case. There is much confusion afoot as regards the present scope of §1983, and this confusion seems magnified by the sheer volume of prisoner cases. Rather than pose the traditional "floodgate" argument, which may discourage a sustained logical assessment of section 1983, one might better look to protecting and re-affirming its *Constitutional* underpinnings while trying to weed out "garden variety torts" traditionally litigated in State courts.[7] Limitations on civil rights actions should be reasoned and rational, rather than merely expedient, but it appears that, in the face of mushrooming numbers of apparently minor claims, some limitation must be made.

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[6] E.g., *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Meachum* v. *Fano*, 427 U.S. 215 (1976); *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Rummel* v. *Estelle*, _____ U.S. _____, 63 L.Ed.2d 382 (1980).

[7] Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and The Federal Case Load*, 1973 Law and Soc. Ord. 557, 566. Judge Aldisert also argued that the flood of property claims after *Lynch* v. *Household Fin. Co.*, 405 U.S. 538 (1972), "has made the Federal Court a nickel and dime court." *Id.* at 569.

SUMMARY OF ARGUMENT

A. Negligence.

The expansion of Section 1983 litigation since *Monroe* v. *Pape*, 365 U.S. 167 (1961) has been dramatic. By specifically eliminating the requirement of "wilful" conduct, by adopting for civil cases an expansive definition of "color of law," and by holding that Section 1983 cases were to be viewed "against a background of tort," the Court invited a wide range of suits. Theories have abounded regarding the relationship between constitutional and tort liabilities, with courts and commentators generally disagreeing about whether the minimum standard for culpability should be negligence. The establishment of an inflexible standard would be illogical in light of the purposes of Section 1983: the level of required culpability should be related to the specific constitutional violation alleged. Where the basis of the claim is the Due Process Clause of the Fourteenth Amendment, without reference to an incorporated provision of the Bill of Rights, a similar flexible standard should be observed: where property interests are implicated under the Due Process Clause, unintentional conduct would normally not suffice. Further, within this framework, where the harm is caused by a state agent in a way unrelated to governmental function or purpose, the harm is not a "misuse of power" and not actionable under Section 1983, at least where negligently caused; in the prison context, where harm from negligent conduct flows from a "housekeeping" rather then a "governmental" relationship between inmate and official, only a state-remedied tort interest is stated, rather then a cause of action under Section 1983.

B. State tort remedies as due process.

While in many cases due process requires that a hearing precede state action resulting in "grievous loss", such pre-deprivation remedies are not universally required — either for "liberty" or "property" interests. Property interests especially may be susceptible to post-deprivation review, since the harm is neither irreparable nor final. Where such property interests

are negligently infringed upon, the only kind of review possible is post-deprivation, and the existence of adequate state claims procedures satisfies requirements of due process.

ARGUMENT

I. While Simple Negligence May Sustain Section 1983 Liability In Some Circumstances, It Is Insufficient To Establish Liability In The Present Case

A. History and Theory of Section 1983 Liability

The question of whether simple negligence may form the basis for liability under Section 1983 has been before this Court on at least two prior occasions, and, on both occasions, the Court declined to give a definitive answer.[8] Most recently, in *Baker* v. *McCollan*, 443 U.S. 137, 139-140 (1979), the Court, speaking through Justice Rehnquist, gave some indication of the complexity of this issue:

> Having been around this track once before in Procunier, supra, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under §1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a §1983 action.

1. Theories of Culpability

This is not to say that various courts and commentators have not attempted to find a path through the forest of §1983 causes of action.[9] Quite the contrary: the forest has many

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[8] *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Baker* v. *McCollan*, 443 U.S. 137 (1979).

[9] See, e.g., *Bonner* v. *Coughlin*, 545 F.2d. 565 (CA 7,1976) (simple negligence not actionable); *Bonner* v. *Coughlin, supra* at 569-578 (dissent by Judge Swygert arguing against relevance of state of mind); *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (requirement of

paths through it, but unfortunately they lead in different directions. Answers proposed regarding levels of culpability under section 1983 have ranged from strict liability for constitutional deprivation[10] to the acceptance of the negligence standard across the board[11] to a uniform rejection of negligence as an acceptable standard[12] to an establishment of an "outrageousness" standard.[13] Cutting across the grain of

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wanton, reckless or grossly negligent conduct in Eighth Amendment medical treatment case); *McCray* v. *Maryland*, 456 F.2d 1 (CA 4, 1972) (allowing recovery on negligence standard); *Penn* v. *Oliver*, 351 F. Supp. 1292 (E.D.Va. 1972) (negligence insufficient for Eighth Amendment claim); *Clappier* v. *Flynn*, 605 F.2d 519 (CA 10, 1979) (same).

Among the commentaries are Abdalian and Lachman, *Federal Courts and Small Claims: Prisoners'* § 1983 *Actions and* § 1983, 33 Arkansas L.Rev. 91 (1979); Note, Actionability of Negligence under *Section* 1983 *and the Eighth Amendment*, 127 U. Pennsylvania L.Rev. 533 (1978); Kirkpatrick, *Defining a Constitutional Tort Under Section* 1983: *The State-of-Mind Requirement*, 46 U. Cincinnati L.Rev. 45 (1977); Note, *Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment*, 52 Indiana L.J. 257 (1976); McCormack, *Federalism and Section* 1983: *Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 Va.L.Rev. 1 (1974); Nahmad, *Section* 1983 *and the "Background" of Tort Liability*, 50 Indiana L.J. 5 (1974); Comment, *The Evolution of the State of Mind Requirement of Section* 1983, 47 Tulane L.Rev. 870 (1973); Shapo, *Constitutional Tort: Monroe* v. *Pape, and the Frontiers Beyond*, 60 Northwestern U.L.Rev. 277 (1965).

[10] *Whirl* v. *Kern*, 407 F.2d 781 (CA 5, 1969), *cert. denied*, 396 U.S. 901; later overturned in *Jones* v. *Diamond*, 594 F.2d 997, 1004 (CA 5, 1979).

[11] *McCray* v. *Maryland*, 456 F.2d 1 (CA 4, 1972).

[12] *Bonner* v. *Coughlin*, 545 F.2d 565 (CA 7, 1976); *McCormack, supra*.

[13] *Shapo, supra*, at 327.

these approaches are those which posit more flexible typologies of liability, either by suggesting that violations of different constitutional provisions require variable standards of culpability,[14] or by finding different standards of culpability depending upon the relative roles of the parties.[15]

The most promising path through the forest is one that looks first at the nature of the constitutional violation and then to the underlying tort principles. It seems clear that the presence or absence of any particular level of culpable activity is only tangentially important to a finding of liability. Negligence should not be arbitrarily enshrined as the common denominator of liability, nor should any other standard. The goal of screening out meritless cases should not encourage expedient solutions to difficult problems.

2. Section 1983 From Reconstruction to Monroe v. Pape

Section 1983 is basically unchanged from its original form:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[16]

Section 1983 was originally designed to protect Southern Blacks from the depredations of the Ku Klux Klan, which waged its well-documented campaigns of terror against a backdrop of inaction, indifference, or impotence on the part of state officials. The act's primary function was to enforce the rights of Southern Blacks where the states could or would

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[14] *Kirkpatrick, supra* at 64-67; *Nahmad, supra* at 25.

[15] *Bonner* v. *Coughlin, supra* (dissent of Judge Swygert).

[16] Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983.

not.[17] The earliest cases utilized the Fifteenth Amendment[18] but in 1927 the Court held in favor of Black Texas voters by invoking the Fourteenth Amendment: Justice Holmes remarked that the Fourteenth Amendment, "while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them." *Nixon* v. *Herndon*, 273 U.S. 536 (1927).

It was not until the period of the Second World War, however, that the act was applied outside the area of racial discrimination. The landmark decision was *Hague* v. *CIO*, 307 U.s. 496 (1939), dealing with the First Amendment. During the next few years the Court was to hand down several additional decisions which would in turn lay the foundations for the great expansion of section 1983 jurisdiction to come in more recent years.[19] Two cases dealing with the criminal analogs to section 1983, now Title 18 U.S.C. 241 and 242, completely changed the direction of juridicial inquiry into the nature of what it meant to act "under color of" state law, which had until this time been assumed to mean acting pursuant to state statute. In *United States* v. *Classic*, 313 U.S. 299, 326 (1941) the Court held that:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

In *Screws* v. *United States*, 325 U.S. 91 (1945), a case involving the fatal beating of a Black man by a Georgia sheriff, the court further expanded the idea that the civil rights acts could

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[17] The legislative history of the act has been well documented in *Monroe* v. *Pape*, 365 U.S. 167 (1961); see also *Shapo, supra* 279-282; Virginia Commission on Constitutional Government, *The Reconstruction Amendment Debates* 1967; Friedman, *A History of American Law*, 299-300, 440-443 (1973).

[18] See, *e.g. Myers* v. *Anderson*, 238 U.S. 368 (1915).

[19] For a detailed examination of this period, see *Shapo, supra* at 282-287.

extend to conduct not specifically prescribed by statute. Justice Douglas found that this was not a case "where an officer not authorized to act nevertheless takes action," but that instead:

> Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. The acts of officers in the ambit of their personal pursuits are plainly excluded.

3. Monroe v. Pape and Its Impact

It took fifteen more years for this Court to extend this usage of the "under color of" concept to the civil area, and the impact of that decision, *Monroe* v. *Pape*, 365 U.S. 167 (1961), can hardly be exaggerated.[20] The plaintiffs in *Monroe* endured unconscionable and brutal treatment at the hands of Chicago police officers. The Court, speaking again through Justice Douglas, held that Fourth Amendment violations, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, stated a cause of action under section 1983. The opinion discussed what it saw as the three main aims of the act:

> *First*, it might, of course, override certain kinds of state laws. . . .
>
> *Second*, it provided a remedy where state law was inadequate. . . .
>
> The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Id.* at 173-174.

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[20] The lower federal courts explored this area during 1945-61. See, e.g. *Shapo, supra* at 287-294; *Picking* v *Pennsylvania R.R.*, 151 F.2d 240 (CA 3, 1945); *Coleman* v. *Johnston*, 247 F.2d 273 (CA 7, 1957); *Jackson* v. *Duke*, 259 F.2d 3 (CA 5, 1958), *McCollum* v. *Mayfield*, 130 F.Supp. 112 (N.D. Cal., 1955).

And further, after discussing the turmoil of the Reconstruction era:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in Federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. *Id.* at 180.

In upholding the civil liability of the police officers in *Monroe*, the Court made at least two major points. First, the Court adopted the broad definition of what constitutes action "under color of" state law from *Classic*. Second, the Court distinguished the level of culpability required under Section 1983 from that of 18 U.S.C. 241, a criminal statute requiring "wilful" conduct:

> In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." 325 U.S. at 103. We do not think that gloss should be placed on §1979 [now §1983] which we have here. The word "wilfully" does not appear in §1979. Moreover, §1979 provided a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. *Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. Id.* at 187 [emphasis added].

It is the "background of tort" language that has proved so troublesome to courts since *Monroe*. The threshhold question is whether this language eliminated any state of mind requirement and allowed liability to be predicated on negligence (or less) rather than on the basis of more culpable behavior.[21]

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[21] See *Whirl* v. *Kern*, 407 F.2d 781 (CA 5), *cert. denied*, 396 U.S. 901 (1969)

A major concern is that section 1983 may, read broadly, appear to encompass virtually the entire field of torts. The difficulty is in balancing the important Constitutional issues with the tort issues so as not to simply duplicate state remedies. As Justice Harlan said, concurring in *Monroe*, *supra* at 193:

> One can agree with my Brother Frankfurter, in dissent, that Congress had no intention of taking over the whole field of ordinary state torts and crimes. . . .

It has been demonstrated that the underlying purposes of section 1983 all looked to situations where state remedies were subject to question, either in substance or practice. The evolution from Reconstruction to *Monroe* is understandable, given the facts of *Monroe*. It is less easy to place the kind of actions described herein within that same context. The temptation to include all tortious conduct by State officials has drawn the attention of this court on more than one occasion since *Monroe*. In *Paul* v. *Davis*, 424 U.S. 693 (1976), Justice Rehnquist suggested limitations to the tort background:

> If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under §1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under §1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and

shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

B. The Standard Of Culpability Depends Upon The Particular Constitutional Right Implicated

1. Negligence May Sustain Liability in Some Areas

The threshhold level of culpability depends on the particular constitutional violation alleged. Negligence may be sufficient to sustain a section 1983 cause of action for some violations but not for others.[22]

One area in which negligence may arguably sustain liability is that of the Fourth Amendment. Probable cause requirements underlying the reasonableness of searches and seizures do not require specific intent or malice for liability.[23] Negligent conduct by State officials has also been found actionable where the right of access to courts has been violated.[24] A cause of action may also be stated where Sixth or First Amendment rights have been negligently violated.

2. Negligence May Be Insufficient to Sustain Liability in Some Areas

On the other hand, other areas do not lend themselves easily to analyses in terms of negligence. Equal protection arguments, for example, generally look to a wrongful motive

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[22] Avoiding Rule 12(b) (6), Federal Rules of Civil Procedure, challenge does not mean that defendants' negligence can pierce immunity. *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Wood* v. *Strickland*, 420 U.S. 308 (1975). Section 1983 also encompasses injunctive and declaratory relief as well.

[23] See *Kirkpatrick*, *supra* at 64-65; *Sibron* v. *New York*, 392 U.S. 41 (1968).

[24] *McCray* v. *Maryland*, 456 F.2d 1 (CA 4, 1972). (Clerk negligently impeded filing of petition); *Welch* v. *Evans*, 402 F.Supp. 468 (E.D. Va., 1975).

as a necessary condition of liability.[25] Likewise, Eighth Amendment claims will not be satisfied by a showing of mere negligence; *Estelle* v. *Gamble*, 429 U.S. 97 (1976), indicated that the standard was at least a showing of "deliberate indifference."[26]

3. *A Flexible Standard Is Required For Fourteenth Amendment Due Process Claims, But Negligence Will Generally Not Sustain Section 1983 Liability Where Property Rights Are Involved*

More difficult is the standard of culpability for claims brought directly under the Due Process Clause of the Fourteenth Amendment without any reference to an incorporated provision of the Bill of Rights. The wording of the Due Process clause is broad, covering deprivation of "life, liberty or property," but, at least insofar as section 1983 liability is concerned, the lack of concrete language defining the precise nature of the constitutional issues (e.g., "right to counsel," "cruel and unusual punishment," "unreasonable search and seizure") has predisposed the courts against broad interpretation. For example, the Court in *Paul* v. *Davis*, 424 U.S. 693, 700 (1976) refused to recognize a constitutionally protected interest in one's reputation:

> Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded [in this case, property interests]. Rather he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tort-feasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to

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[25] See, e.g. *Snowden* v. *Hughes*, 321 U.S. 1 (1944); *Williams* v. *Field*, 416 F.2d 483 (CA 9, 1969).

[26] See also *Rummel* v. *Estelle*, _____U.S. _____ 63 L.Ed.2d 382 (1980); *Trop* v. *Dulles*, 356 U.S. 86 (1958).

> derive from congressional civil rights statutes a body of general federal tort law [citation omitted]; *a fortiori* the porcedural guarantees of the Due Process Clause cannot be a source for such law.

Property interests are generally defined in accordance with State law.[27] Yet, as one commentator has suggested:

> The primary interest intended to be protected by the due process clause is not property, but procedure. The clause is intended to restrain arbitrary action by the state. Therefore, inadvertant or unknowing conduct by a state officer would generally not infringe the procedural right of the individual party that the Fourteenth Amendment is designed to protect.[28]

4. *Where the Governmental Relationship Between the Parties Is Only Incidental To the Negligent Deprivation, the Proper Remedy Is a State Tort Claim Rather Than A Section 1983 Action*

Although most lower courts seem to hold that negligence will not suffice in due process property cases,[29] such a rule should not be inflexible. The real issue is the scope of the particular constitutional duty. It is useful in this regard to attempt a characterization of the nature of the state actor's conduct. This analysis was suggested by Judge Swygert's dissenting opinion in *Bonner* v. *Coughlin*, 545 F.2d 565 (CA 7, 1976), *cert. denied* 435 U.S. 932, rejecting a negligence standard while looking at whether state power was misused:

> When the state employs a person and authorizes him to carry out particular governmental functions, not all of his activities are directed solely to that objective. Nonetheless, the nature of his second by second activities would not be exactly the same were it not for his function of state authority. *Some differentiation between those activities directed toward accomplishing the state objectives and those which are incidental or individual must be made.* A police officer driving a squad car might

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[27] *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

[28] *Kirkpatrick*, *supra* at 66.

[29] E.g. *Bonner* v. *Coughlin*, 545 F.2d 565 (CA 7, 1976).

> negligently pass through a stop sign and injure a pedestrian in an intersection, but in this regard he should be viewed no differently than an ordinary civilian driver. It is true that but for his state authority he might not have been driving at that time or place and he may have been carrying out his duties at the time — scanning the streets for a robbery suspect, for example — but I believe that such an instance cannot fairly be characterized as a "misuse of power" which occured while acting "under color of state law." *Id.* at 574-575.

Judge Swygert then applied this analysis to prisoner lawsuits:

> This reasoning can be applied to the prison setting. *First, a distinction must be made between those activities of prison personnel which partake of the governmental role of a prison system and those remaining activities which flow inexorably from the fact of confinement.* Activities falling into the first category always occur under color of state law, but only certain of the activities in the latter group can be so characterized.
>
> The activities in the inherently governmental category include those having to do with security, discipline, and commerce between inmates and persons outside the prison. Also encompassed within this category is the regulation of a prisoner's First Amendment activities undertaken in a manner consistent with the state's authority to incarcerate. Consequently, the search of a cell, the censorship of mail, and the process whereby a prisoner is considered for discipline for alleged infractions of prison rules would all be regarded as occuring under color of state law. If during the course of these kinds of activities a deprivation of a constitutional right occurs, a section 1983 action should be maintainable.
>
> The analysis for activities within the second classification is not as clear. Prison personnel act as custodians, providing food, shelter, exercise facilities, safety measures, and a host of other incidentals. These services must be offered as a consequence of the primary fact of imprisonment. A prisoner cannot, for example, call a private physician when he is ill and those in charge of his confinement must therefore assume that responsibility. [Citation omitted.] *Nothing inherently or peculiarly governmental occurs in the exercise of these functions.* *Id.* at 575. [Emphasis added.]

In this second, "housekeeping," category, Judge Swygert argued that simple negligence should not give rise to a Section 1983 cause of action. It is into this catetory that Respondent Taylor's claim of negligent package handling falls. The negligence of the responsible state officials as regards the routine handling of mailed property does nothing more than state a Nebraska tort claim. Similarly, one court reasoned that where a prisoner was injured because the state failed to adequately maintain a dishwasher, such a claim did not reach constitutional proportions:

> Furthermore, Snyder's alleged injury is not of the type where the risk of harm was increased substantially because he was a state prisoner. . . . The mere fortuity that the accident occured in a prison does not vest petitioner Snyder with a right to federal adjudication of what is essentially a state common law tort claim, and petitioner's allegation of a slip and fall incident makes out nothing more than a common law tort.

Snyder v. *Blackenship*, 473 F.Supp. 1208, 1211-1212, (W.D. Va. 1979).

Respondent has not suffered as a result of misuse of state power as it was conceived either by the drafters of the Civil Rights Act of 1871 or under the rationale adhered to in *Monroe* v. *Pape*, *supra*.[10] Here, however, this may not have been the case with intentional action. The cause of action arose solely because of alleged negligence, and, given the basically non-governmental function involved (handling a package), the only logical redress is in a state tort claim action.

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[10] See *Kimbrough* v. *O'Neil*, 545 F.2d 1059 (CA 7, 1976) (with concurring opinion of Judge Swygert).

II. The Existence Of Adequate State Tort Claims Remedies Satisfies The Requirements Of Procedural Due Process

A. Due Process Does Not Always Require Predeprivation Review Where Liberty or Property Interests Are Implicated

The second major issue raised in this case concerns the relationship between the availability of state tort remedies and the requirements of due process under the Fourteenth Amendment. Petitioners have argued quite correctly that under the circumstances respondent has not been deprived of due process but has, in fact, been afforded the opportunity for due process by virtue of Nebraska's state tort claims remedies.

The touchstone of procedural due process may be characterized as fundamental fairness, and no particular set of procedures is mandated for all situations. As Justice Frankfurter stated in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123 (1951) (concurring opinion):

> The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Id. at 162-163.

The consideration of what process is due depends upon the particular circumstances. The court further held in *Cafeteria and Restaurant Workers Union* v. *McElroy*, 376 U.S. 886, 895, that:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

While it is true that in many instances due process requires a hearing prior to deprivation of liberty or property, such is not invariably the rule. The Fourteenth Amendment does not forbid the taking of life, liberty, or property — only the taking without due process of law. In some situations it is either impossible or impractical to hold a prior hearing, and in those circumstances due process must necessarily entail post-deprivation review.[31]

This court dealt with the issue of whether state tort remedies could satisfy due process in *Ingraham* v. *Wright*, 430 U.S. 651 (1977). In that case the argument that due process mandated prior review of school corporal punishment was rejected:

> In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse — considered in light of the openness of the school environment — afford significant protection against unjustified corporal punishment. [Citation omitted.] Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them. *Id.* at 678. . . .[T]he Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common law constraints and remedies.

Id. at 683.

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[31] See dissenting opinion of Justice Stevens in *Ingraham* v. *Wright*, 430 U.S. 651, 701 (1977) (including citations at note 1).

B. Where Property Interests Are Involved, Post-deprivation Remedies Will Generally Be Adequate.

Ingraham was a 5-4 decision, with vigorous dissents by Justices White and Stevens. Even the dissenting opinions seem to favor appellants' arguments in the present case. In arguing that state tort remedies do not satisfy due process requirements for excessive infliction of corporal punishment, Justice White made the following point:

> Second, and more important, even if the student could sue for good faith error in the infliction of punishment, the lawsuite occurs after the punishment has been finally imposed. *The infliction of pain is final and irreparable; it cannot be undone* in a *subsequent proceeding*. [*Id.* at 695; emphasis added.]

Taking of property, at least of the type involved in this action, can indeed be "undone."

This distinction between liberty and property interests was suggested in Justice Stevens' dissent:

> When only an invasion of property interest is involved, there is a greater likelihood that damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. *In the property context, therefore, frequently a postdeprivation state remedy may be all the process that the Fourteenth Amendment requires*. [*Id.* at 701; emphasis added.][32]

This echoes Justice Stevens' (then Circuit Judge Stevens) original panel opinion in *Bonner* v. *Coughlin*, 517 F.2d 1311 (1975), a case with facts similar to the present case.

> It seems to us that there is an important difference between a challenge in an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the

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[32] See also *Arnett* v. *Kenedy*, 416 U.S. 134, 178-179 (1974).

> Fourteenth Amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the palintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.
>
> This is not to suggest that the plaintiff in a § 1983 action must exhaust his state remedies before seeking federal relief. Rather, it seems to us that the availability of an adequate state remedy for a simple property damage claim avoids any constitutional violation.[33]

C. Where Deprivation Of Property Is Unintentional, Post-deprivation Review Satisfies Due Process Requirements

The fact that respondent complains of negligent rather than purposive conduct is also significant.

> Here, however, there is no possible way in which a state could afford a hearing to a citizen in advance of an unanticipated negligent act by a state agent; necessarily-unless the Due Process Clause is construed to impose an impossible standard — the post incident machinery must be sufficient to meet the demands of due process.

Id. at 1319, n. 24. In the present case, where a negligent property deprivation is alleged, a prior hearing was both impossible and unrequired. The state tort remedy was available and adequate, and as such afforded due process.

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[33] See *Secret* v. *Brierton*, 584 F.2d 823, 47 ALR Fed 1 (CA 7, 1978).

CONCLUSION

For the foregoing reasons, your *Amicus*, The State of Hawaii, respectfully urges that this Court reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

WAYNE MINAMI
Attorney General of Hawaii

JAMES H. DANNENBERG
Deputy Attorney General of Hawaii
Counsel of Record

Attorneys for Amicus Curiae

Department of the Attorney General
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813
(808) 548-4740

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In the
Supreme Court of the United States
October Term, 1980

ROBERT PARRATT and FRANCIS LUGENBILL,
Petitioners,

vs.

BERT TAYLOR, JR.,
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR EDWIN F. MANDEL LEGAL AID CLINIC AS AMICUS CURIAE

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University Avenue
Chicago, Illinois 60637
(312) 324-5181
Attorney for Amicus Curiae

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With the consent of the Petitioners and the Respondent, the Mandel Legal Aid Clinic submits this brief as amicus curiae in support of the Respondent, Bert Taylor, Jr.

STATEMENT OF INTEREST

The Mandel Legal Aid Clinic, in existence since 1959, has been dedicated to protecting against and remedying, deprivations of constitutionally protected rights. The Clinic has represented prisoners, mental patients, and others who have been institutionalized against their will and forced to turn over their property to the custody of the state. It is important that this area of the law be clarified so that those institutionalized by the state can receive prompt and just compensation.

SUMMARY OF ARGUMENT

Mr. Taylor's Fifth and Fourteenth Amendment rights were violated when the Warden and Hobby Manager of the Nebraska Penal and Correctional Complex did not return his hobby kit or give him $23.50 (the undisputed value of the hobby kit). The State of Nebraska, through its prison officials, confiscated Mr. Taylor's hobby kit in 1975 until he was released from disciplinary segregation. Whenever a state confiscates prisoner property, other than contraband, it is constitutionally required either to return the property or to pay the prisoner the value of the property. Here Nebraska has done neither.

Nebraska claims that it does not have custody of the hobby kit and does not know where it is or who has it.

It refuses, and has refused since 1975, to pay Mr. Taylor the undisputed value of $23.50. Everyone agrees that the kit was received by the prison and that the kit was never forwarded to Mr. Taylor. The Petitioners argue instead that Mr. Taylor must sue Nebraska and its officials in state court to obtain the $23.50. There they may assert Nebraska's statutory defenses since Nebraska has not fully waived its sovereign immunity. The Petitioners admit that Mr. Taylor tried several times to obtain his property through the administrative procedures of the prison. In each instance he was refused his property or its value. Then when he filed in the federal district court, Nebraska defended the suit there, appealed to the Eighth Circuit Court of Appeals and sought and obtained review by this

Court even though there has never been any dispute that Nebraska confiscated the hobby kit, the value is $23.50 and the hobby kit cannot be returned to the prisoner.

The State of Nebraska asserts that its motive is to keep the federal courts from becoming deluged with claims from prisoners involving disposition of their property. But this is simply the wrong case to make that argument because here the great waste of judicial resources is solely the result of Nebraska's unjustified and adamant refusal to return Mr. Taylor's hobby kit or pay him $23.50. Amicus asserts that at least in such circumstances due process has been violated and there is no need for resort to the state courts before seeking redress in the federal courts under 42 U.S.C. §1983.

The State of Nebraska undertook to provide a system to safeguard Mr. Taylor's property. Having taken Mr. Taylor's property, Nebraska was obliged either to return the property or pay for it. If the State refuses to pay, those who negligently cause the property to become lost or stolen should be held liable.

Supervisory liability should be imposed for negligently supervising the procedures and personnel responsible for keeping Mr. Taylor's hobby kit, particularly when other inmates are given this position of trust. Indeed this Court should uphold the trial court's finding that the Petitioners were negligent. It should be affirmed because it is based on the same logic and policy used to fashion the presumption of negligence under the doctrine

of res ipsa loquitur since the Petitioners did not come forward with any evidence to rebut the presumption of negligence.

ARGUMENT

I. THE PETITIONERS' FAILURE TO RETURN THE HOBBY KIT TO THE RESPONDENT IS A CONSTITUTIONAL DEPRIVATION AND IS REMEDIABLE UNDER SECTION 1983.

Amicus contends that prison officials who retain the property of prisoners in their custody have a constitutional duty either to return the property or to compensate the prisoner for his loss. The failure of prison officials to do so when there is no dispute about the rightful owner of the property is a deprivation and a taking in violation of the Fourteenth Amendment.

Though a prisoner's rights "may be diminished by the needs and exigencies of the institutional environment, a

prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." Wolff v. McDonnell, 418 U.S. 539, 555 (1974). In support of the proposition that prisoners retain their basic constitutional guarantees, §1983 actions have been upheld against prison officials who denied prisoners the freedom of religion, Cruz v. Beto, 405 U.S. 319 (1972); Cooper v. Pate, 378 U.S. 546 (1964); the right of access to the courts, Bounds v. Smith, 430 U.S. 817 (1977); the right to correspond by mail with outsiders, Procunier v. Martinez, 416 U.S. 396, 413-14 (1974); and the right to procedural safeguards for the protection of liberty interests. Wolff v. McDonnell, 418 U.S. 539 (1974). The question before this Court is what protections are afforded to a prisoner's

property rights. Specifically, is a prisoner entitled to relief when prison officials fail to return property which they took and held as custodians?

Amicus does not contend that a prison official may never detain the belongings of a prisoner. Surely a guard may seize a prisoner's effects in order to maintain prison security and, indeed, Mr. Taylor does not complain that his hobby kit was illegally taken. Amicus rejects the notion, however, that a prisoner is divested of all property rights and, therefore, may be permanently deprived of his possessions.

This Court has indicated that the property of prisoners is given as much protection as the property of non-prisoners. For example, in Robinson v. Hanrahan, 409 U.S. 38 (1972),

it was held that a state may not institute a forfeiture proceeding against a prisoner without giving him adequate notice of the action. This Court reasoned that a prisoner is constitutionally entitled to the same quantum of notice as a non-prisoner when the state seeks to deprive him of his property. See Bell v. Wolfish, 441 U.S. 520, 557 n.38 (1979); Burger, Report on Federal Judicial Branch-1973, 59 A.B.A.J. 1125, 1128 (1973).

In Weddle v. Director, Patuxent Institution, 436 F.2d 342 (4th Cir. 1970), rev'd mem., 405 U.S. 1036 (1972), the Court of Appeals for the Fourth Circuit denied a §1983 claim to a prisoner who alleged a deprivation of property worth $3.52 on the grounds that deprivations of property were not remediable under §1983. Reversing and remanding

the lower court's decision, this Court instructed the lower court to consider Lynch v. Household Finance Corp., 405 U.S. 538 (1972), which had previously held that property deprivations are remediable under §1983. Other courts have inferred from the reversal in Weddle that property rights of prisoners are constitutionally protected and that the deprivation of those rights gives rise to a §1983 claim for relief. See Demps v. Wainwright, 522 F.2d 192, 194 (5th Cir. 1975); Hansen v. May, 520 F.2d 728 (9th Cir. 1974).

Various lower courts have found that prison officials have a constitutional duty to return property entrusted to them and that unjustified misappropriations by prison officials may be remedied by §1983. See, e.g., Jensen v. Klecker, 599 F.2d 243 (8th Cir. 1979); Alexanian

v. N.Y. State Urban Corp., 554 F.2d 15, 17 (2nd Cir. 1977); Sell v. Parratt, 548 F.2d 753 (8th Cir.), cert. denied, 434 U.S. 873 (1977); Carter v. Estelle, 519 F.2d 1136 (5th Cir. 1975); Carroll v. Sielaff, 514 F.2d 415, 417 (7th Cir. 1975); Hansen v. May, 502 F.2d 728, 730 (9th Cir. 1974); Russell v. Bodner, 489 F.2d 280 (3rd Cir. 1973). Prior to the "taking" of Mr. Taylor's hobby kit in 1975, the Court of Appeals for the Eighth Circuit had upheld at §1983 action filed by an individual who claimed that a local sheriff had wrongfully failed to return property that was taken from him at the time of his arrest. Cruz v. Cardwell, 486 F.2d 550, 551 (8th Cir. 1973).

The taking of a prisoner's property by the state is analogous to the situation in which a state takes the property

of a non-prisoner. Unless it is legitimately exercising its police powers, it is unconstitutional for a state to permanently deprive its citizens of property which the state holds in its custody. See Webb's Fabulous Pharmacies v. Beckwith, 49 U.S.L.W. 4033 (Dec. 9, 1980). In Beckwith, it was held that the retention by state officials of interest that accrued on interpleaded funds was a "taking" which violated the Fifth Amendment. The Court reasoned that the retention of the accrued interest was unconstitutional because there was "no police power justification offered for the deprivation." Id. at 4035. The plaintiff in Beckwith did not contend that the State of Florida had no right to require the initial deposit of funds with the court pending the disposition of the

case. Rather, the plaintiff successfully contended that the state's failure to return the interest amounted to an unconstitutional deprivation.

As in Beckwith, the State of Nebraska required Mr. Taylor to entrust his hobby kit with state officials. Unlike "auto accidents, personal injuries, and road repair," (Brief for Petitioners at 20), the property at issue was intentionally taken from Mr. Taylor. After the inmates assigned to the hobby center received the hobby kit, they intentionally stored it and intentionally transported it within the prison system. While Mr. Taylor was in Deadlock, the hobby kit was intentionally withheld from him. The fact that the Petitioners had an established procedure for delivering property to prisoners indicates that they foresaw that they would store

such property. (Petition for Certiorari, Appendix A).

Even if the "taking" in this case was an unintentional act, this Court has not adopted the proposition that only willful takings are constitutional violations. As Mr. Justice Stewart stated: "[T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate...." Hughes v. Washington, 389 U.S. 290, 298 (1967) (Stewart, J., concurring), quoted in, Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 331 (1973) (emphasis added). The reach of the Fourteenth Amendment is not limited to intentional takings without due process of law. "Its purpose, more

particularly, is to protect ... use and possession of property from arbitrary encroachment -- to minimize substantively unfair or mistaken deprivations of property...." Fuentes v. Shevin, 407 U.S. 67, 81 (1972); Carey v. Piphus, 435 U.S. 247, 259-60 (1978).

Contrary to the position of the Petitioners (Brief for Petitioners at 8-9), the focus is on the detriment to the individual, rather than on the benefit to the state, in determining whether there has been a deprivation of property without due process of law. As this Court noted, "the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking." United States v. General Motors, 323 U.S. 373, 378 (1945). The fact that "[t]he current possessors of the property

in question, and the purpose to which it has been put, remains a mystery" (Brief for Petitioners at 9) should, therefore, be irrelevant in deciding whether or not there has been a constitutional deprivation.

Like the lower courts which decided the case at bar, various courts have held that public officials have a constitutional duty to return property which they hold as custodians. A plaintiff may recover damages from a customs official who fails to deliver his property in a timely fashion. See State Marine Lines Inc. v. Shultz, 498 F.2d 1146, 1155 (4th Cir. 1974). Likewise, in Clayton v. Shaw, 548 F.2d 1155 (5th Cir.), cert. denied, 434 U.S. 873 (1977), the Court of Appeals for the Fifth Circuit held that a court clerk has a constitutional duty to return seized

evidence, and his failure to do so gives rise to a §1983 claim for relief. The Fifth Circuit has also ruled that a policeman has a constitutional duty to return to the plaintiff a car that he impounded without notice. Bunkley v. Watkins, 567 F.2d 304 (5th Cir. 1978). Like these other public officials who hold the property of citizens in a custodial capacity, the Petitioners are in a unique position to violate the trust reposed in them. A reason for the imposition of liability in these situations was well stated long ago in a case which held that bonded depositories of public funds were strictly liable for any lost money.

> Public policy requires that every depositary of the public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that "he should keep safely" the moneys which come to his hands. Any relaxation

> of this condition would open the door to frauds, which might be practiced with impunity.

United States v. Prescott, 44 U.S. (3 How.) 578,88 (1845). It is important for this Court to recognize the right that prisoners have to their property. It would be patently unjust if the State of Nebraska were permitted to take Mr. Taylor's hobby kit and not return it.[1/] Indeed, one cause of the seething anger of prisoners is that their property is often abused and taken by prison officials.

1/ Since Mr. Taylor sued the Warden and the Hobby Manager in their official capacities, his action could be construed as a claim against the State of Nebraska for the return of the hobby kit or its value. Ex Parte Young, 209 U.S. 123 (1908). Amicus is of the view that a better result would occur if the Fourteenth Amendment was interpreted to override the Eleventh Amendment to allow such compensation through 42 U.S.C. Section 1983. Property rights have been viewed traditionally as at the core of the 14th Amendment. This Court has recognized

(Footnote continued on next page)

II. THE RESPONDENT HAS BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Contrary to the assertions of the Petitioners (Brief for Petitioners at 12), the existence of the Nebraska State Tort Claims Act, Neb. Rev. Stat.,

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(Footnote #1 continued from previous page)

that the 14th Amendment requires that the States cannot take property without making just compensation. At least in cases like this one when the State refuses to make any offer to pay for the property taken, and the State has not fully waived its sovereign immunity in its own courts to such claims. Section 1983 should provide direct access to the federal courts. Amicus believes that such a result is required by the categorical language and purposes of Section 1983 and sound policy for a well ordered relationship between the need to provide meaningful remedies for prisoners who have been wronged by prison officials and the protection of prison officials' proper administrative judgment in running prisons without an undue threat of federal court actions. However, amicus recognizes that this Court would require carving an appropriate narrow exceptions to the broad rulings in Edelman v. Jordan, 415 U.S. 651 (1974) and Quern v. Jordan, 440 U.S. 332 (1979). But see Hutto v. Finney, 437 U.S. 678 (1978).

§81-8, 209 et seq., does not necessarily provide the Respondent with his measure of due process. While the existence of a post-deprivation remedy may satisfy due process in circumscribed situations, a post-deprivation remedy does not satisfy due process if it does not provide meaningful relief. For example, in Goss v. Lopez, 419 U.S. 565 (1975), this Court found that an Ohio statute which purported to give suspended school children a remedy did not satisfy due process because, in most circumstances, the statute did not give the suspended student a remedy. Id. at 581 n.10. Similarly, in Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 19-21 (1978), it was found that the theoretical availability of remedies to consumers whose gas had been turned off by a city owned utility did not satisfy due process,

because the remedies were too expensive for the average consumer to pursue.

In analyzing whether or not Nebraska has available an adequate remedy, it is significant that prior to the commencement of his §1983 action, Mr. Taylor made many good faith attempts to recover his property. As was stipulated

> Over a considerable period of time plaintiff made numerous inquiries and requested assistance in tracing his packages. None of the efforts of the persons so contacted were productive of any further information regarding the disposition of said packages.

(Petition for Certiorari, Appendix A). Only after Mr. Taylor was unable to obtain relief through the grievance route did he bring this action.

Despite the failure of the prison grievance system, the Petitioners urge that the Nebraska State Tort Claims Act, Neb. Rev. Stat., §81-8, 209 et seq., provides Mr. Taylor with due

process. It is apparent from the face of the statute, however, that its sovereign immunity may still bar recovery in the instant action. Specifically, the statute denies recoveries where a claim arises with respect to "the detention of any goods or any merchandise by any law enforcement officer." Neb. Rev. Stat., §§81-8, 219(b). The State of Nebraska may well argue that this provision immunizes it from suits by prisoners who have deposited property in the custody of prison officials. Moreover, the Nebraska State Torts Claims Act bars recovery when the loss was caused by a state official acting in a "discretionary" capacity. As this Court has noted, the distinction between discretionary acts of government officials and ministerial acts of government officials is murky. Owen v. Independence,

445 U.S. 622, 648 n.31 (1980); see Brown v. Omaha, 183 Neb. 430, 434-35, 160 N.W.2d 805, 808 (1968). The State of Nebraska may, therefore, attempt to shield itself from liability by arguing that all acts the warden undertook in a supervisory capacity to implement the prison mailing system were discretionary.

In Ingraham v. Wright, 430 U.S. 651 (1977), this Court suggested that there may well not be a deprivation of a liberty interest without due process of law if the state which deprived the plaintiff of his liberty interest consented to being sued for the deprivation. The approach taken in Ingraham, however, assumes the existence of a meaningful state remedy. Id. at 678 n.46. Because Nebraska has retained a significant measure of sovereign

immunity, no such remedy exists in this case. Thus, even under the approach to due process suggested in Ingraham, Mr. Taylor has been deprived of his hobby kit without due process of law.

Those deprived of their constitutional rights have not been required to exhaust their state judicial remedies before bringing an action under 42 U.S.C. §1983. Ellis v. Dyson, 421 U.S. 426, 432-33 (1975); Steffel v. Thompson, 415 U.S. 452, 472-473 (1974). Rather, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Monroe v. Pape, 365 U.S. 167, 183 (1961). Thus, the theoretical availability of a Nebraska remedy is an insufficient basis for foreclosing Mr. Taylor's federal remedy when his constitutional rights have been invaded.

III. REGARDLESS OF THEIR VALUE, PROPERTY RIGHTS ARE PROTECTED UNDER THE FOURTEENTH AMENDMENT AND UNDER SECTION 1983.

There is no language in either 42 U.S.C. §1983 or in 28 U.S.C. §1343(3) which suggests that only property having a specified, minimum market value is protected by those sections. When an individual alleges that a state has deprived him of property without due process of law, jurisdiction over the claim is conferred upon the federal courts by 28 U.S.C. §1343(3). Lynch v. Household Finance Corp., 405 U.S. 538, 543 (1972). Unlike other statutes which grant jurisdiction to the federal courts, 28 U.S.C. §1343(3) contains no amount in controversy requirement. Rather, jurisdiction lies whenever the "underlying substantive right that was allegedly violated ... was conferred by the Constitution ...." Maher v.

Gagne, 100 S.Ct. 2570, 2574 n.11 (1980). Amicus contends that Mr. Taylor's right to his hobby kit is a right that is conferred by the Constitution.

Generally, all property is protected from state deprivations by the Fourteenth Amendment. See North Georgia Finishing Inc. v. Di-Chem Inc., 419 U.S. 601, 608 (1975); Fuentes v. Shevin, 407 U.S. 67, 89-90 (1972). Since he was deprived of many of his liberty interests, the imprisoned Mr. Taylor may have placed a greater value on his hobby kit than he would have if he were a free man. Bonner v. Coughlin, 517 F.2d 1311, 1314, n.11 (7th Cir. 1975), modified en banc, 545 F.2d 565 (7th Cir. 1976), cert. denied, 435 U.S. 932 (1978). It would be unfair if a state were permitted to take a prisoner's property without compensation

merely because those outside the prison placed a lower value on it. See Ferranti v. Moran, 618 F.2d 888, 891 (1st Cir. 1980); Pritchard v. Perry, 508 F.2d 423, 425 (4th Cir. 1975).

Indeed, it would be inconsistent with both the Fourteenth Amendment and common sense if a state were permitted to take a person's possessions - even those which have a relatively small market value - and then refuse to return them.

IV. THE PETITIONERS SHOULD BE HELD LIABLE FOR THE LOSS CAUSED BY THEIR NEGLIGENT SUPERVISION OF THE PRISON HOBBY SYSTEM.

A. Negligence Should Be A Sufficient Basis For Liability In These Circumstances.

Amicus contends that this is not an appropriate case for a decision on whether simple negligence is sufficient to establish liability under

§1983. As amicus interprets it, this case presents only the narrow question: Is a §1983 remedy available when a state detains the property of prisoners and others who are institutionalized and then fails to return it to them? This Court has noted the difficulty of fashioning a rule which would cover all negligent acts and has implicitly recognized that the duty of care owed by public officials varies with the circumstances. See Baker v. McCollan, 443 U.S. 139-40 (1979). It may be argued that in situations where state officials do not have as great a duty of care, simple negligence may not be a sufficient basis for liability under §1983. Amicus asserts, however, that state officials undertake a high duty of care when they hold property in trust, and that the failure to return

such property amounts to a constitutional deprivation.

There is nothing in either the language of 42 U.S.C. §1983 or in the cases that have construed it which compels the conclusion that simple negligence can never be a sufficient basis for liability under that section.

> By the plain terms of §1983, two- and only two-allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law. See Monroe v. Pape, 365 U.S. 167, 171 (1961).

Gomez v. Toledo, 100 S.Ct. 1920, 1923 (1980); see Owen v. Independence, 445 U.S. 622, 652 (1980). Particularly in situations when it is easy for a state to misuse its power, such as when it holds property in trust, negligence should be a sufficient basis for liability under §1983.

The imposition of liability in situations when the state holds an individual's property and then fails to return it comports with the twin purposes of a §1983 damage remedy, i.e., compensating victims of constitutional deprivations and deterring violators of constitutional rights. See, e.g., Owen v. Independence, 445 U.S. 622, 651 (1980); Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978); Carey v. Piphus, 435 U.S. 247, 254 (1978). It may be argued that a damage remedy will not deter negligent conduct. That notion, however, was recently rejected: "[T]he threat that damages might be levied ... may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional

rights." Owen v. Independence, 445 U.S. 622 at 652. See also Carlson v. Green, 446 U.S. 14, 21 (1980).

Even if the imposition of liability on the Petitioners should increase the federal court caseload, an increased burden on the federal courts is not in itself a sufficient basis for denying a remedy to an individual whose constitutional rights have been abridged. Davis v. Passman, 442 U.S. 228, 248 (1979); Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 411 (1971) (Harlan, J., concurring). Indeed, the increase in the courts' caseload will not be significant because only those who have entrusted their property to the state and have been denied compensation will be affected by this decision.

B. The Petitioners Negligently Supervised The Prison Mailing System.

The district court property concluded that the Petitioners were liable for their negligent failure to supervise. As the court below stated:

> The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in loss of personal property for Mr. Taylor, which loss should not go without redress.

Taylor v. Parratt, No. 76-L-57 (D.Neb. Oct. 25, 1978). The court based its finding on the stipulations and the facts presented below and amicus asserts that the court properly drew the inference of negligence.

The reasons for the application of the doctrine of res ipsa loquitur are present here. Mr. Taylor is now unable to identify precisely what happened to his hobby kit. His inability to determine the cause of his loss,

however, is only a natural consequence of his confinement, see Fayerweather v. Bell, 447 Supp. 913, 916-17 (M.D. Pa. 1978), and should not be a sufficient reason to deny him the right to recover. To alleviate the difficulty facing the injured plaintiff without access to sources of proof, he should be allowed to use the doctrine of res ipsa loquitur "as an aid ... in sustaining the burden of proving breach of the duty of care...." Commercial Corp. v. N.Y. Barge Corp., 314 U.S. 104, 113 (1941).

The conditions for recovery under res ipsa loquitur are well known and are delineated by Prosser:

> (1)[T]he event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agent or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. Some courts

> have at least suggested a fourth condition, that evidence as to the true explanation of the event must be more readily accessible to the defendant than to the plaintiff.

W. Prosser, Handbook of the Law of Torts, 214 (4th Ed. 1971). Res ipsa loquitur has been used as a basis for liability in cases, such as the one at bar, in which plaintiffs seek to recover for losses caused by the defendant's negligent failure to supervise. Texas Pipe Bending Co. v. Gibbs, 580 S.W.2d 41, 45-6 (Tex. Civ. App. 1979); Fogal v. Genesee Hosp., 41 A.D.2d 468, 344 N.Y.S. 2d 552 (4th Department 1973).

The application of res ipsa loquitur will not make prison officials insurers against all losses suffered by prisoners.[2/]

2/ Because the prison officials exercised exclusive control over the lost hobby kit, the case at bar is distinguishable from Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976),

(Footnote continued on next page)

Although res ipsa loquitur establishes a prima facie case, it does not shift the burden of persuasion from the plaintiff. Thus, if the Petitioners are

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(Footnote #2 continued from previous page)

cert. denied, 435 U.S. 932 (1978). In Bonner, the court denied a Section 1983 cause to a prisoner who lost his trial transcript after prison officials had left his cell door open. In Bonner, however, the property lost was originally in the prisoner's cell and was not in the custody of prison officials. Moreover, there was no clear causal link in Bonner between the acts of state officials and the prisoner's loss of property. 545 F.2d 565 at 567. Indeed, the loss of the transcript could have been caused by the acts of other prisoners or by the negligence of the plaintiff himself. In sharp contrast to Bonner, however, the loss in the case at bar could only have been attributed to the supervision of the officials. As was stipulated, all incoming packages are kept in the custody of the Nebraska Penal Complex until such time as they are delivered to the addressee. Only in exceptional circumstances, none of which were present here, are the packages delivered to someone other than the designated recipient. Thus, state officials maintained sole control of incoming mail until such time as it is delivered to the designated prisoner, and any loss which occurs prior to the delivery is, therefore, traceable to prison officials.

able to raise sufficient doubts about the validity of the inference of negligence, Mr. Taylor would not be permitted to recover. See Southern Ry. v. Prescott, 240 U.S. 632, 640 (1916); Prosser, supra, at 231.

A finding that the Petitioners negligently failed to supervise should not be barred by the holding of Monell v. New York Department of Social Services, 436 U.S. 658 (1978), that §1983 liability cannot be imposed on the basis of respondeat superior. There is an important difference between respondeat superior and supervisory liability. Whereas liability is imposed under respondeat superior "solely on the basis of the existence of an employer-employee relationship with a tortfeasor," 436 U.S. 658, at 692, liability based on supervisory negligence is imposed because

the "failure to establish proper procedures or adequately train or supervise personnel led to the deprivation of prisoners' constitutional rights." McClelland v. Facteau, 610 F.2d 693, 696 (10th Cir. 1979). As the Court of Appeals for the Tenth Circuit stated in McClelland:

> Defendants argue that because the police chiefs had no personal knowledge of or did not participate or acquiesce in any of the alleged constitutional deprivations, they cannot be sued under Section 1983. ... We do not agree. A crucial difference exists between liability as a master (respondeat superior) and direct liability. Respondeat superior is a doctrine of vicarious liability based upon public policy - the notion that the person who benefits by the acts of the servant must pay for wrongs committed by the servant; the one held liable as master need not be at fault in any way. Under direct liability, plaintiff must show the supervisor breached a duty to plaintiff which was the proximate cause of injury. The law clearly allows actions against supervisors under Section 1983 as long as a sufficient causal connection is present and the plaintiff was deprived under color

> of law of a federally secured right. (citations omitted).

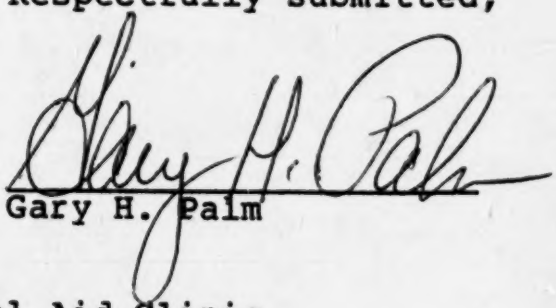
610 F.2d 693 at 695. See Navarro v. Chief of Police, Des Moines, 523 F.2d 214, 218 n.3 (8th Cir. 1975); Beverly v. Morris, 470 F.2d 1356, 1357 (5th Cir. 1972).

This Court suggested in Monell that §1983 could be based on supervisory liability. In drawing the contours of the immunity afforded principals by §1983 this Court stated that "the mere right to control without any control or direction being exercised without any failure of supervision is not enough to support §1983 liability." 436 U.S. 655, 694 n.58. By implication a supervisor may be found liable where he exercises actual control, but his failure to supervise leads directly to the constitutional deprivation.

CONCLUSION

For the aforementioned reasons the judgment of the Courts below should be affirmed.

Respectfully submitted,



Gary H. Palm

Gary H. Palm
Edwin F. Mandel Legal Aid Clinic
University of Chicago Law School
6020 South University
Chicago, Illinois 60637
(312) 324-5181

Counsel for Amicus Curiae*

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*Counsel would like to acknowledge the assistance of Jeremy A. Berman, a third-year law student at the University of Chicago Law School, in the preparation of this brief.

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NO. 79-1734

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT PARRATT, ET AL.,
Petitioner

v.

BERT TAYLOR, JR.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

ROBERTA THOMAS BROWN
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

Of Counsel:
Michael B. Roitman

I.

QUESTION PRESENTED

1. Whether the simple negligence of a prison official in losing a package constitutes a deprivation of property without due process sufficient to form the basis of a judgment under 42 U.S.C. §1983.

PARTIES

The parties to this case are Robert Parratt and Francis Lugenbill, the petitioners, and Bert Taylor Jr., the respondent.

INTEREST OF AMICUS CURIAE

The Commonwealth of Massachusetts files this brief in support of the petitioner's claim.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS AS AMICUS CURIAE

The Commonwealth of Massachusetts respectfully asks that the decision of the United States Court of Appeals for the Eighth Circuit be reversed.

OPINION BELOW

The memorandum opinion of the United States District Court for the District of Nebraska, Civ. 76-C-57 (10/25/78) is set out in Appendix A. The United States Court of Appeals for the Eighth Circuit summarily affirmed the decision of the District Court without issuing an opinion.

JURISDICTION

This Court has jurisdiction over this case under 28 U.S.C. 1291.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law...."

42 U.S.C. §1983, the statutory basis for respondent's suit, is set out in Appendix B.

STATEMENT OF THE CASE

The Commonwealth accepts the statement of the case set out in petitioners' brief.

SUMMARY OF ARGUMENT

1. The action of the prison officials in allowing their subordinates to negligently lose a package sent to the plaintiff/appellee did not violate his constitutional rights. First, there is no constitutional right to receive a package sent through the mail, nor a constitutional duty to properly deliver packages. Second, the loss of a hobby kit worth $23.50 is de minimus.

2. The District Court misapplied precedent. Either intentional or grossly negligent conduct is necessary to deprive someone of liberty or property without due process.

3. The purpose of 42 U.S.C. §1983 is not achieved by allowing actions based on merely negligent conduct. The deterrent effect of allowing negligent conduct to trigger a constitutional violation is far outweighed by the increased liability of state officials and increased federal caseload.

ARGUMENT

I. THE ACTION OF THE PRISON OFFICIALS DID NOT VIOLATE THE PLAINTIFF'S CONSTITUTIONAL RIGHTS

The first element of a Section 1983 suit is the deprivation of a right "secured by the Constitution and laws."

Baker v. McCollan, _____ U.S. _____, 99 S. Ct. 2689, 2692 (1979). It is possible to dispose of this case by finding either that there is no constitutional right to have packages properly delivered to prisoners, or that the loss of a hobby kit worth $23.50 is a de minimus constitutional deprivation of property. However, due to the significance of the issue, it would be preferable for this Court to clearly articulate the intent necessary for the deprivation of liberty or property without due process under a Section 1983 action.

A. THERE IS NO CONSTITUTIONAL DUTY TO PROPERLY DELIVER PACKAGES WHICH ARE SENT TO PRISONERS

The respondent's basic claim is that the prison officials failed to properly

deliver a package, which he had ordered through the mail. In order for this failure to constitute the basis of a Section 1983 action, there must be a constitutional duty to properly deliver packages or conversely a constitutional right to receive packages sent through the mail. In Baker v. McCollan, supra, at 2695, this Court determined that a detention of three days based on a facially valid arrest warrant did not rise to the level of a constitutional deprivation of liberty without due process. Similarly, in this case the failure of the prison guards to properly deliver the package does not rise to the level of a constitutional deprivation of property without due process. The respondent may well have a state tort

action for conversion, misdelivery by a bailee, or negligence but neither conversion nor misdelivery nor negligence become constitutional violations because the plaintiff is a prisoner or the defendant a state official. Cf. Baker, supra, at 2696 (false imprisonment); Estelle v. Gamble, 429 U.S. 97, 106 (1976) (medical malpractice).

B. THE LOSS OF A HOBBY KIT WORTH $23.50 IS A DE MINIMUS CONSTITUTIONAL VIOLATION

The district court found that the loss of respondent's hobby kit was a deprivation of property without due process in violation of the Fourteenth Amendment to the Constitution. (Appendix A at 9). The hobby kit was worth $23.50. In Nickens v. White, 536 F.2d

802, 803 (8th Cir. 1976) the court determined that the confiscation of an office supply catalogue from a prisoner was a de minimus deprivation of property. In Pitts v. Griffin, 518 F.2d 72, 73 (8th Cir. 1975) the prisoner's claim of a deprivation of property based on the confiscation of a multi-frenquency radio was dismissed as frivolous.[1/] Similarly, if this Court should find this loss of a hobby kit worth $23.50 to be a constitutional violation, it should also find it to be de minimus.

1/ But see, Russell v. Bodner, 489 F.2d 280, 281 (3d Cir. 1973) (deprivation of seven packages of cigarettes sufficient for constitutional violation).

II. THE PRISON OFFICIALS DID NOT ACT WITH THE REQUISITE LEVEL OF INTENT REQUIRED FOR A SECTION 1983 ACTION BASED ON A FOURTEENTH AMENDMENT VIOLATION

A. THE DISTRICT COURT JUDGE MISSAPPLIED THE LAW

The district court judge, citing Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972) and Monroe v. Pape, 365 U.S. 167 (1961), determined first that a Section 1983 action proceeds against a background of tort liability. (App. A at 6). Second, the judge determined that negligence is a tort. From the two premises, the district court concluded that a negligent act may form the basis of a Section 1983 suit. (App. A. at 6).

Neither Howell v. Cataldi, supra, nor Monroe v. Pape, supra, support the court's analysis. In Howell, supra the Third Circuit specifically stated that "proof that the conduct was

intentional," is required for an action under Section 1983. Howell, supra, at 281. The "background of tort liability" referred to in Monroe, supra at 187, involved intentional torts.[2/]

The district court judge's analysis also involves an incorrect logical leap from premise to conclusion. Not all tort violations are Section 1983 violations. Paul v. Davis, 424 U.S. 693 (1976) (defamation) Baker v. McCollan, ____ U.S. ____, 99 S. Ct. 2689, 2693-94 (false imprisonment). Estelle v. Gamble, 429 U.S. 97 (1978)

2/ If tort law is applied to the facts in Monroe, supra, the defendants probably committed the intentional torts of assault, battery, false imprisonment, intentional infliction of emotional distress and invasion of privacy. See Restatement Torts 2d, §8A, set out at note 6, infra., for the classic statement of tort intent.

(medical malpractice). Simply finding a possible basis for tort liability does not establish an action under Section 1983. Care must be taken in employing the tort analogy. Carey v. Piphus, 435 U.S. 247, 254-56 (1978).

B. EITHER INTENTIONAL OR GROSSLY NEGLIGENT CONDUCT IS NECESSARY FOR AN UNCONSTITUTIONAL DEPRIVATION OF LIBERTY OR PROPERTY WITHOUT DUE PROCESS

In Paul v. Davis, 424 U.S. 693, 699 (1961) this court stated that the due process clause of the Fourteenth Amendment and Section 1983 do not "make actionable many wrongs inflicted by government employees which had heretofore been thought to give rise only to state law tort claims." In this case, the plaintiff, Taylor, did not claim that the prison officials took his hobby kit, but that their negligence

permitted some unknown person to take the kit.[3/] The Fourteenth Amendment does not extend to such a claim; it does not grant a prisoner a right to be free from injury wherever the state may be characterized as the tortfeasor. Paul, supra at 700. The Fourteenth Amendment is not

> a font of tort law to be superimposed upon whatever systems may already be administered by the states. We have noted the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckridge, 403 U.S. 88, 101-02 (1971); a fortiori the procedural guarantees of the Due

3/ The issue of whether the defendants in this action, the warden of the prison and the supervisor of the hobby shop, should properly be liable under a theory of respondeat superior is not addressed in this Amicus brief.

> Process Clause cannot be the source for such law.

Paul, supra, 424 U.S. at 700. The dissenting justices in Paul, supra argued that "intentional conduct" which deprives a person of liberty or property without due process is within reach of Section 1983. Paul, supra, 720. But this Court has never indicated that merely negligent conduct triggers a constitutional violation.

In order to deprive someone of property without due process, or to act under color of state law and cause a deprivation of property without due process, intentional or reckless or conduct is required. There was simply no intentional or reckless action involved in the loss of Taylor's property.

Bonner v. Coughlin, 545 F.2d 565 (7th Cir. 1976) (en banc) cert. denied 435 U.S. 932 (1978), a case involving a Section 1983 suit based on a negligence claim, followed this analysis of a Fourteenth Amendment violation. In Bonner, supra, prison guards negligently left a prisoner's cell door open while he was away from his cell. When he returned, his cell had been ransacked and his trial transcript taken. The Seventh Circuit affirmed summary judgment for the defendants on the negligence claim. Bonner, supra 545 F.2d at 569. The Court in Bonner clearly stated that

> [t]here is no claim that the guards intended the result or

> even acted in reckless disregard of Bonner's constitutional rights. Given that lack of intent and lack of reckless disregard, we hold that in the context of Section 1983 the guards did not deprive him of his property and, therefore did not cause him to be subjected to the deprivation of his Fourteenth Amendment right not to have his property taken by the state without due process.

Bonner, 545 F.2d at 569. Similarly, in Stringer v. Rowe, 616 F.2d 993, 100 (7th Cir. 1980) the Seventh Circuit held that the negligent loss of a prisoner's personal papers while being transferred from one prison to another did not create a constitutional violation.[4/]

[4/] Cf. Ferranti v. Moran, 618 F.2d 888 (1st Cir. 1980) (allegation that guard "unlawfully and viciously" took a prisoner's radio and "knowingly destroy[ed]" it for no legit[imate] reason" survives a motion to dismiss; Jenson v. Klecker, 599 F.2d 243, 245 (8th Cir. 1979) (allegation of intentional deprivation of property sufficient for complaint).

Chief Justice Burger, concurring in Procunier v. Navarette, 434 U.S. 555, 568 (1978), has sweepingly indicated that "[n]either the language nor the legislative history of §1983 indicates that Congress intended to provide remedies for negligent acts." At least with regard to the Fourteenth Amendment, negligent conduct is insufficient to create a deprivation of liberty or property.

In Monroe v. Pape, 365 U.S. 167, 187 (1961) this Court indicated that specific intent is not required in a civil rights case.[5/] The more

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5/ See, Developments in the Law: Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1205-1209 (1977); McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I, 60 Va. L. Rev. 1, 54-55 (1974).

general tort intent - intending the consequences of ones actions - is required.[6/] Certainly Monroe, supra, does not indicate that negligence is sufficient to trigger a constitutional deprivation of property without due process. Bonner v. Coughlin, supra. 545 F.2d at 568.

III. ALLOWING ACTIONS BASED ON SIMPLE NEGLIGENCE VIOLATES THE PURPOSE OF 42 U.S.C. §1983

The central purpose of the Civil Rights Act was "to provide protection to those persons wronged by the '[m]isuse of power, possessed by virtue of state law and made possible only because the

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6/ Restatement Torts 2d, S8A provides: The Word 'intent' is used through the Restatement of this subject to denote that the actor desires to cause consequences of his act, or that he belives that the consequences are substantially certain to result from it.

wrongdoer is clothed with the authority of state law'" Owen v. City of Independence, 445 U.S. 622, 650 (1980) quoting Monroe v. Pape, 365 U.S. at 184. Not only was Section 1983 designed to provide redress to victims of constitutional violations but more importantly it was "to serve as a deterrent against future constitutional deprivations." Owen, supra., at 651, Robertson v. Wegmann, 436 U.S. 584, 590-91 (1978).

A Section 1983 suit directed at a state official who is intentionally depriving a person of liberty or property without due process will undoubtably have a deterrent effect on future abuses of power. On the other hand, a Section 1983 suit is less likely to deter future mistakes, or negligent

conduct. Allowing Section 1983 suits to be based on simply negligent deprivations of liberty or property without due process would vastly increase the liability of state officials and inundate the federal courts with negligence suits, while only marginally serving the purpose of Section 1983.

CONCLUSION

For the reasons stated above the decision of the United States Court of Appeals for the Eighth Circuit, which summarily affirmed the decision of the United States District Court for the District of Nebraska, should be reversed.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL

ROBERTA THOMAS BROWN
Assistant Attorney General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2240

Of Counsel:
Michael B. Roitman

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 76-L-57

BERT TAYLOR, JR.,

Plaintiff,

vs.

ROBERT PARRATT, et al.,

Defendants.

MEMORANDUM OPINION

(Filed October 25, 1978)

This civil rights action pursuant to 42 U. S. C. § 1983 is before the Court on a motion for summary judgment by the plaintiff, Bert Taylor. The plaintiff claims that he has been denied certain property, that is, a hobby kit valued at $23.57, without due process of law. This Court has jurisdiction under 28 U. S. C. § 1343. The parties entered into a stipulation of facts which are these:

Mr. Taylor ordered a kit through the mail and paid for the order with two drafts drawn on his inmate account by the prison officials. The packages arrived at the penal complex on April 15, 1975, and were signed for by inmates assigned to the hobby center. Mr. Taylor was in the adjustment center at the time and not permitted to have such hobby materials. Normal prison policy for the receipt of mail packages is that after packages arrive in the central mail room, they are either delivered to the prisoner who signs a receipt for the package or the prisoner is notified to pick up the package

and sign a receipt for the package at that time. It is not a policy to allow other inmates to sign for packages because the receipt is the prison's record of having delivered the package to the prisoner. Deviations from these regulations occur under exceptional circumstances, but no such circumstances existed here. Mr. Taylor contacted several officials in regard to the whereabouts of his packages but no one was able to find them. Mr. Taylor has never received the packages.

Three issues are presented by the motion for summary judgment: whether negligent action by state officials can be a basis for an action under 42 U. S. C. § 1983; whether penal complex officials are immune from damage actions of this kind; and whether a property right of this sort is cognizable under Section 1983.

The first issue that must be addressed is whether the negligence of state officials can be a basis for an action for deprivation of property under Section 1983. Section 42, United States Code, Section 1983, provides in pertinent part:

> Every person who, under color of any statute, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Howell v. Cataldi*, 464 F. 2d 272 (3d Cir. 1972), the court analyzed a damage action under Section 1983 in the following manner: the petition must show that the conduct was done by someone under color of law and

that the conduct subjected the complainant to a deprivation of rights secured by the Constitution. Once deprivation has been established, the proof proceeds against a backgromnd of tort liability. The court stated:

> Thus, although proof of specific intent to deprive a person of his federally protected rights is not required, there must be at least proof of the "condition usually demanded by the law for liability in an action of tort (which) is the existence of either wrongful intention or culpable negligence on the part of the defendant." Salmond, *Law of Torts*, 6th Ed. 1924 p. 11.

This "background of tort liability" was originally discussed in *Monroe v. Pape*, 365 U.S. 167 (1961):

> The word "wilfully" does not appear in Section 1979 (Section 1983). . . . Section 1979 (1983) should be read against the backgrounnd of tort liability that makes a man responsible for the natural consequences of his actions.

Therefore, under *Monroe* and *Howell, supra*, negligence can form the foundation for an action under Section 1983. Most actions under this section have involved personal injuries; however, the Eighth Circuit has specifically recognized actions involving a deprivation of property as cognizable under Section 1983. *See Nickens v. White*, 536 F. 2d 802 (8th Cir. 1976).

The second issue is whether the prison officials are immune from a damage action such as this. In *Procunier v. Navarette*, 46 U.S.L.W. 4144 (February 22, 1978), it was alleged that prison officials had negligently and inadvertently misapplied prison regulations which denied prisoners their constitutional rights. The prison officials defended on the basis that the officials were immune

from damage actions under Section 1983. The Court's decision supplied only qualified immunity and stated the standard as follows:

> The immunity defense would be unavailing to petitioners if the constitutional right allegedly infringed by them was clearly established at the time of their challenged conduct.

The officials in *Procunier* were granted immunity because at the time the cause of action arose, there was no clearly established first amendment right protecting the mailing privileges of state prisoners. In dicta, *Procunier* established that total immunity is not available for prison officials, but the question of whether negligent conduct by prison officials could form the basis for a cause of action under Section 1983 was never reached. This court must consider other case law for direction on that question.

In *Wood v. Strickland*, 420 U.S. 308 (1975), a suit was brought against members of a Board of Education by two students who were suspended for several months for allegedly "spiking" punch with two bottles of malt liquor at a school function. The school board members raised the defense of absolute immunity from damage actions. The district court found the school board members immune; however, the circuit court reversed and reached the merits of the decision. On review by the Supreme Court, the following standards for immunity were set forth:

> Therefore, in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under Section 1983 if he knew or reasonably should have known that the ac-

> tion he took within his sphere of official responsibility would violate the constitutional rights of the students affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student. That is not to say that school board members are "charged with predicting the future course of constitutional law." (Citation omitted.) A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot be characterized as being in good faith.

The plaintiff argues that under the *Woods* analysis, the prison officials knew or reasonably should have known that their failure to follow normal procedures would result in a violation of Mr. Taylor's constitutional rights and are, therefore, not immune from suit under Section 1983. This court finds that the *Woods* analysis is applicable to actions against prison officials and that no immunity from suit exists in this situation where the defendants knew or reasonably should have known that their actions would result in a violation of Mr. Taylor's rights.

The final issue is whether the specific deprivation of property, a hobby kit, implicates due process rights. In *Nickens, supra,* the Court found that the confiscation of a mail order catalog was so deminimus that due process rights were not infringed. *See also Pitts v. Griffin,* 518 F. 2d 72 (8th Cir. 1975), involving the confiscation of a multi-frequency radio pursuant to prison regulations limiting radios to AM frequencies; *Rhodes v. Sigler,* 448 F. 2d 1237 (8th Cir. 1971), concerning a prison bill for $2.45; *Howard v. Swenson,* 426 F. 2d 277 (8th Cir. 1970), in-

volving the confiscation of several pairs of shoes. However, in the instant case, Mr. Taylor received authorization to procure the hobby kit and requested that prison personnel withdraw payment for the kit from his prison account. The hobby kit was ordered and paid for, sent to Mr. Taylor through the United States mails, and received by the prison but never delivered to Mr. Taylor. This is not a situation where prison officials confiscated contraband. The negligence of the officials in failing to follow their own policies concerning the distribution of mail resulted in a loss of personal property for Mr. Taylor, which loss should not go without redress.

Accordingly, this Court finds that the plaintiff is entitled to prevail on the motion for summary judgment and to an award for damages and attorney fees under 42 U. S. C. § 1988. However, an order according to this memorandum will not be entered until such time as the parties are heard with reference to attorney fees. To that end, if the parties are unable to agree and stipulate to a fee, without prejudice to their respective rights to appeal, within ten (10) days from date hereof, they shall so notify this Court so that a hearing date may be scheduled and the matter presented to the Court for determination.

BY THE COURT:

/s/ Albert G. Schatz

Judge, United States District Court

Appendix B.

42 U.S.C. §1983 Provides:

Every person who, under color or any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

MICHAEL RODAK, JR., CLER

NO. 79 - 1734

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ROBERT PARRATT AND
FRANCES LUGENBILL,

Petitioners,

V.

BERT TAYLOR, JR.,

Respondent.

BRIEF FOR AMICUS CURIAE IN SUPPORT OF THE STATE OF NEBRASKA, PETITIONER

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

BARBARA C. MARQUARDT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

1. Whether simple negligence, if proven, may form the basis of a judgment under 42 U.S.C. §1983.

2. Whether in a property context a post deprivation state remedy is all the process that the Fourteenth Amendment requires.

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NO. 79-1734

IN THE

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BERT TAYLOR, JR.,
Respondent.

BRIEF FOR AMICUS CURIAE IN SUPPORT OF THE STATE OF NEBRASKA, PETITIONER

AUTHORITY TO FILE AMICUS CURIAE BRIEF

The State of Texas, through Mark White, its Attorney General, respectfully submits this brief as *amicus curiae* under the authority of Rule 36.4, United States Supreme Court Rules. It is in support of the State of Nebraska's petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit.

INTEREST OF AMICUS CURIAE

The State of Texas has an interest in urging the Court to reverse the decision of the Court of Appeals for the Eighth Circuit because this Court's opinion will have a significant impact on the nature and scope of prisoner litigation under 42 U.S.C. §1983.

STATEMENT OF THE CASE

The State of Texas adopts and hereby incorporates the statement of the case as set forth in the State of Nebraska's brief.

ARGUMENT OF AMICUS CURIAE

1. Simple negligence may not form the basis of a judgment under 42 U.S.C. §1983.

In this action, state prison officials were sued for negligence which resulted in the loss of a prisoner's property; that is, a hobby kit valued at $23.57, without due process of law. Such a claim is not cognizable under 42 U.S.C. §1983.

This Court in *Carey v. Piphus*, 435 U.S. 247 (1978), ruled that the due process clause raises no impenetrable barrier to the taking of a person's possessions or liberty or life. Rather, it prohibits the mistaken or unjustified deprivation of life, liberty or property. Therefore, mere negligence in dealing with property does not constitute a due process violation. Arguably, the good faith immunity approved in *Wood v. Strickland*, 420 U.S. 308 (1975), and *Pierson v. Ray*, 386 U.S. 547 (1967), is recognition that something more than ordinary negligence is required to form the basis of a judgment under 42 U.S.C. §1983 against state officials. *See also*, *Procunier v. Navarette*, 434 U.S. 555, 566 (1978); *Rizzo v. Goode*, 423 U.S. 362, 375 (1976); *Washington v. Davis*, 426 U.S. 229 (1976).

Most of the circuit courts have held that simple negligence may not form the basis of a judgment under 42 U.S.C. §1983. *Bonner v. Coughlin*, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. den.*, 435 U.S. 932 (1977)(prisoner's suit for loss of a trial transcript); *Stringer v. Rowe*, 616 F.2d 993 (7th Cir. 1980)(prisoner's suit for loss of personal property); *Beard v. Mitchell*, 604 F.2d 485 (7th Cir. 1978)(suit

against an FBI agent over the reckless nature of his investigation); *Secret v. Brierton*, 584 F.2d 823 (7th Cir. 1978)(prisoner's suit for deprivation of and damage to his personal property); *McDonald v. State of Illinois*, 557 F.2d 596 (7th Cir. 1977)(prisoner's suit over his homicide conviction allegedly caused by the negligence of officials); *Jones v. Diamond*, 594 F.2d 997 (5th Cir. 1979)(prisoners' challenge over the conditions of their confinement); *Tate v. Blackwell*, 475 F.2d 193 (5th Cir.), *cert. den.*, 412 U.S. 922 (1973)(inmate's suit for damages resulting from personal injuries); *McClelland v. Facteau*, 610 F.2d 693 (10th Cir. 1979)(suit concerning the deprivation of constitutional rights during the period of arrest and custody); *Page v. Sharpe*, 487 F.2d 567 (1st Cir. 1973)(prisoner's suit over medical care received while in custody); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1972), *cert. den. sub. nom., Employee-Officer John v. Johnson*, 414 U.S. 1033 (1973)(prisoner's suit for injuries and delay in medical treatment); *Rhodes v. Sigler*, 448 F.2d 1237 (8th Cir. 1971)(prisoner's suit for loss of $2.46 to the prison complex); *Nettles v. Rundle*, 453 F.2d 889 (3rd Cir. 1971)(per curiam)(prisoner's suit for negligence in the diagnosis and treatment of his medical complaint). *Contra, Puckett v. Cox*, 456 F.2d 233 (6th Cir. 1972). Reliance by the Court below on *Howell v. Cataldi*, 464 F.2d 272 (3rd Cir. 1972), as support for the position that simple negligence may be the basis for an action under 42 U.S.C. §1983 was improper. In *Howell*, the court specifically refused to reach the negligence issue. *Howell v. Cataldi, supra*, at 279, n.11.

The State of Texas as *amicus curiae* urges the Court to adopt the reasoning of the majority of the circuit courts and hold that simple negligence may not form the basis of a judgment under 42 U.S.C. §1983.

2. In a property context, a post deprivation state remedy is all the process that the Fourteenth Amendment requires.

Paul v. Davis, 424 U.S. 693, *rehearing den.*, 425 U.S. 985 (1976), involving an alleged liberty interest deprivation, held that a violation of state tort law isn't necessarily a deprivation of a constitutional right cognizable under 42 U.S.C. §1983. In *Ingraham v. Wright*, 430 U.S. 697 (1977), this Court ruled that where state law provided sufficient redress for junior high students who sought to challenge the schools' disciplinary procedures, the case for finding a due process violation of the constitution was not compelling.

Similarly, in *O'Grady v. Montepelier*, 573 F.2d 747 (2d Cir. 1978), a suit by landowners against city officials for damage to property, the court ruled that a right to compensation under state law does not mean that there has been a deprivation of property in the sense contemplated by the Fourteenth Amendment. *Urbano v. Calissi*, 384 F.2d 909 (3rd Cir. 1967) *cert. den.*, 391 U.S. 925 (1968), a suit by a prisoner over the taking of some personal property, held that since plaintiff set out a simple, common law offense for which relief was available under state law, his claim lacked any substantiality as a federal civil rights action.

In *Weddle v. Director, Patuxent Institution*, 405 U.S. 1036 (1972), this Court vacated and remanded the decision of the Fourth Circuit at 436 F.2d 342 (1970) that a prisoner's suit for reimbursement of property worth $3.52 was not cognizable under 42 U.S.C. §1983 in light of *Lynch v. Household Finance Corp.*, 405 U.S. 538, *rehearing den.*, 406 U.S. 911 (1972). The instant case is distinguishable from *Lynch* because the plaintiff there had a property interest which could not be redressed in state court necessitating the protection of the due process clause through 42 U.S.C. §1983, while the respondent herein has a state tort claims remedy available.

Courts have recognized that there is a *de minimis* level of imposition on due process interests with which the constitution is not concerned. *Ingraham v. Wright*,

supra; O'Grady v. Montepelier, supra; Johnson v. Glick, supra; Nickens v. White, 536 F.2d 802 (8th Cir. 1976); *Pitts v. Griffin,* 518 F.2d 72 (8th Cir. 1975); *Kimble v. Department of Corrections, State of Michigan,* 411 F.2d 990 (6th Cir. 1969); *Howard v. Higgins,* 379 F.2d 227 (10th Cir. 1967)(per curiam).

The State of Texas urges this Court to rule that considering the *de minimis* nature of the property interest in this case and the fact that a state tort claims remedy is available to redress the complaint, the respondent's constitutional right to due process has not been violated.

CONCLUSION

It is not the function of the federal courts to run prisons or to control the ordinary internal management and disciplining of individual inmates. *United States ex rel. Wagner v. Ragen,* 213 F.2d 294 (7th Cir.), *cert. den.,* 348 U.S. 846, *rehearing den.,* 348 U.S. 884 (1954), *cert. dismissed, Wagner v. Stratton,* 350 U.S. 926 (1955); *Sawyer v. Sigler,* 445 F.2d 818 (8th Cir. 1971); *Rhodes v. Sigler,* 448 F.2d 1237 (8th Cir. 1971); *Howard v. Swenson,* 426 F.2d 277 (8th Cir.), *cert. den.,* 400 U.S. 948 (1970).

The State of Texas as *amicus curiae* urges this Court to reverse the decision of the Court of Appeals for the Eighth Circuit in light of the above policy, the *de minimis* nature of the claimed property interest, the availability of a state tort claims remedy and the fact that mere negligence is the basis for the liability.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant

RICHARD E. GRAY, III
Executive Assistant

PAUL R. GAVIA
Chief, State & County Affairs

Barbara C. Marquardt
by Susan J. Dunlap

BARBARA C. MARQUARDT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Amicus Curiae

No. 79-1734

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT PARRATT and FRANCES LUGENBILL,

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vs.

BERT TAYLOR, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATE OF NEW JERSEY AS AMICUS CURIAE

JOHN J. DEGNAN,
Attorney General of New Jersey,
Attorney for the State of New Jersey, as Amicus Curiae,
State House Annex,
Trenton, New Jersey 08625.
(609) 292-4925

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

JOSEPH T. MALONEY,
GEORGE W. FISHER, JR.,
Deputy Attorneys General,
On the Brief.

Adams Press Corp., 5 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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BRIEF FOR THE STATE OF NEW JERSEY AS AMICUS CURIAE

Interest of the Amicus

The State of New Jersey, acting by and through its Attorney General, respectfully submits this brief as amicus curiae, pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States, because of its importance to the State in the operation of its state penal,

correctional and training institutions for convicted offenders.

The State of New Jersey has been engaged in the operation of penal, correctional and training institutions for many years. As in most states, the facilities are not self supporting but financed by state appropriations, staffed by state civil service employees, and operated for the incarceration of offenders who, with the exception of a limited number of inmates on work release programs, do not contribute towards the costs of their care and custody.

The State operates three major prisons, four large correctional institutions, two training schools for youthful offenders, five residential group centers, an adult diagnostic center, five community treatment centers, nine parole offices and numerous satellite facilities. It has approximately 6,400 offenders in custody in state institutions and 9,600 parolees under in-state supervision. In addition, there are twenty-six jails and other penal institutions operated by the various counties in New Jersey, housing over 5,000 offenders in custody.

The New Jersey Department of Corrections provides professional and administrative leadership in the planning, programming, and operation of penal and correctional facilities for the State. Its present role is a complex one and includes, consistent with modern penological aims, stimulating the development of non-State operated community alternatives to incarceration, half-way houses, work-release programs, and the promulgation and enforcement of minimum standards for county penal institutions. The traditonal function of the State in the operation of large penal institutions, however, remains a major undertaking of the State, as it is for most states. New Jersey State appropriations for the 1980 fiscal year for operating the various state penal institutions are approximately $86,000,000.

The present case brings into focus the collision of the modern penological concept which permits inmates to keep an array of personal belongings and creature comforts during imprisonment with the novel legal precedent reached below in this case, which will undoubtedly cause humanitarian prison officials who permit such practices to become the targets of federal civil rights actions whenever such inmate property is allegedly lost, damaged, destroyed, or stolen, due to simple negligence.

New Jersey is one of the states which favors permitting inmates to keep personal belongings with the clear understanding, however, that the institution is not an insurer of such belongings. In connection with personal property held by inmates of New Jersey institutions, all inmates are advised in writing that any personal property held by them is held at their own risk* (Standards, Department of Corrections, §209.262) and that any personal property they retain of substantial value, such as personally owned radios, must be marked for identification (Id., §209.271).

Upon arrival at the New Jersey prison the inmate receives a handbook of inmate rights and duties which inform him that he is permitted a large and varied quantity of personalty. He may have appliances, including a fan, television, portable radio, electric razor, ice chest. He may have food and beverages, books, newspapers, periodicals,

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* As to articles not kept by the inmates, Department Standards contain policies and procedures for safekeeping valuables, clothing and money taken from inmates on their admission or received by them during incarceration. The inmate is given a signed receipt for such valuables, and they are placed in a heavy manila envelope, suitably inscribed with the inmate's name, and placed in a fire-proof safe under lock at all times. Valuables not retained are sent to the inmate's home by insured mail or railway express, etc. Standards, §309.

photographs, pictures, typewriters, hobby equipment, rugs, curtains, and shelves, etc. The wardrobe permitted, per inmate, alone, consists of the following:

3 pair of long trousrers (State issue only)

3 pair of shorts (State issue only)

7 set of underwear

7 pair of socks

2 pair of shoes or work boots (limited to six inches from the bottom of the heel to the top) no platform shoes permitted

2 pair of sneakers

1 pair of slippers

7 short or long sleeve shirts any color or color combination except solid blue

2 sweaters

2 sweatshirts with or without hoods

1 sweatsuit

2 sets of thermal underwear

1 bathrobe

8 towels

5 handkerchiefs

1 hat—state issue

1 outer wear jacket—state issue

2 pair pajamas

5 wash cloths

2 belts—1¾ inch maximum width, no large buckles

In view of the result reached by the courts below in the instant case, the New Jersey penological practice of permitting inmates to have a considerable amount of personal property in their possession should also be viewed with an eye to the State's experiences at its Trenton State Prison concerning claims by its inmates for loss or damage to inmate personalty.

At Trenton State Prison, the average inmate population for the three year period 1977-1980 was 953 inmates. During that same period, the prison received a total of 329 claims by its inmates for lost, damaged or destroyed property. The claims varied from approximately $9 to $4000, but averaged approximately $200, and certain inmates submitted more than one claim. The claims related to property stolen by other inmates, property that an inmate was forbidden to have, property that inmates had given or bartered away to other inmates, property that inmates claimed had been damaged during a search or transfer, property that vanished after an inmate escaped, property that was proved to be owned by an inmate other than the claimant, etc. Approximately 5% of the claims were found, after investigation, to be valid, and in those cases the inmate received compensation.* The overwhelming number of claims related to property that the inmate could not demonstrate that he had ever owned, or received, or that he was permitted to have, etc. It was also determined that the claims submitted were for inflated values running approximately triple the property's worth.

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* During the three year period ending November 18, 1980, the Department of Corrections approved 276 claims for payment filed by inmates of the Department's seven major institutions. These ranged from $1.19 to $250.00 and the majority of the claims filed were for sums of less than $30.00.

The State of New Jersey endorses the humane principle that state prison inmates should be permitted to have a variety of personal property and belongings while they are serving their terms in incarceration. It also believes that penal administrators should reimburse an inmate, pursuant to internal state administrative mechanisms, for the loss or damage of such personal property, shown to be actually owned by the inmates, consisting of the type of property he is permitted to have under prison rules, and which is lost or damaged through the negligence of the prison administration. Nevertheless, given the serious problems of revenue-raising and the allocation of limited governmental resources among numerous vital state services, the State of New Jersey, as amicus curiae, has a vital interest in seeking a reversal of the decision below. The recognition of a constitutional right to the protection of an inmate's personal property from loss or damage caused by mere simple negligence, as a basis for a money damages award against state prison officials personally, tends to make insurers of prison officials, may well force them to curtail inmate belongings out of necessity, and will not advance any state's efforts to improve its prison system. Instead, funds will be diverted to finance the legal defense or indemnification of overworked and modestly paid prison personnel who will be suable by present and former inmates for violation of a heretofore undefined constitutional right to be free from negligence. The State of New Jersey, therefore, strongly urges the court to reverse the decision of the court below.

ARGUMENT

POINT I

An inmate whose property is lost or missing following the mere negligent failure of prison officials to adhere to normal procedures regarding receipt of incoming packages does not thereby sustain a deprivation of Fourteenth Amendment rights cognizable under 42 U.S.C. §1983.

One issue the Court is asked to decide in this case is whether a plaintiff who alleges conduct on the part of a state officer which amounts to no more than mere negligence has stated a cause of action under 42 U.S.C. §1983. As recognized by the Court, that issue

> ". . . is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a §1983 action." *Baker* v. *McCollan,* 443 U.S. 137, 140-141 (1979).

On the two prior occasions in which the Court was presented with this issue, it was able to dispose of the cases on other grounds and was thus not required to decide it. *Baker, id.; Procunier* v. *Navarette,* 434 U.S. 555 (1978).

Before the Court should address the state of mind requirements for §1983 liability generally, however, it must first consider and decide the threshold issue whether the deprivation of a federally protected right has occurred. *Baker, supra; Martinez* v. *California,* —— U.S. ——, 100 S. Ct. ——, 62 L. Ed. 2d 481 (1980). Section 1983 imposes liability only upon one

> "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof *to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws. . . .*" (emphasis added).

Hence, in the absence of the occurrence of a deprivation of a right "secured by the Constitution and laws", there can be no liability under §1983. In the instant case, in reaching the conclusion of §1983 liability, both the District Court for the District of Nebraska and the Court of Appeals for the Eighth Circuit apparently presupposed a deprivation of respondent's Fourteenth Amendment rights by the loss of his hobby kit following an inadvertent failure on the part of appellants to comply with prison procedures calling for an inmate to receipt packages incoming to him. Such presupposition was patently erroneous and will have the effect, if left uncorrected, of stretching the Fourteenth Amendment and 42 U.S.C. §1983 far beyond their intended scope, thereby transforming federal courts entertaining §1983 claims into courts of general tort jurisdiction. Clearly, wholly apart from the relationship of the Fourteenth Amendment to *de minimus* property claims (see Point II, *infra*), insufficient causal connection between the loss and the conduct of appellants and insufficient culpability on their part existed to establish a deprivation of respondent's Fourteenth Amendment rights.

There can be no §1983 cause of action against the prison officials in this case because any evidence that it was their action which deprived respondent of his property is entirely lacking. Initially, the Fourteenth Amendment provides that "no *state* shall . . . deprive any person

of life, liberty or property. . . ." (emphasis added). Moreover, as this Court noted in *Baker, supra,* 433 U.S. at 142, a public official is liable under §1983 only "if he *causes* the plaintiff to be subjected to deprivation of his constitutional rights. . . ." *Cf. Rizzo* v. *Goode,* 423 U.S. 362 (1976). The issue, then, becomes the causal nexus which is constitutionally required to establish the necessary state action for a violation of the Fourteenth Amendment and §1983. This Court has very recently addressed that issue in *Martinez* v. *California, supra.*

In *Martinez,* the survivors of a 15-year-old girl who was murdered by a parolee brought a §1983 action against California officials responsible for the parole decision, contending that their actions deprived the decedent of her life without due process of law. Rejecting that argument and holding that the murder was too remote a consequence of the decision to parole to establish state action under the Fourteenth Amendment, the Court in a unanimous opinion declared:

> "Although the decision to release Thomas from prison was action by the State, the action of Thomas five months later can not be fairly characterized as state action. Regardless of whether, as a matter of state tort law, the parole board could be said either to have had a 'duty' to avoid harm to his victim or to have proximately caused her death, . . . we hold that, taking these particular allegations as true, appellees did not 'deprive' appellants' decedent of life within the meaning of the Fourteenth Amendment." 62 L. Ed. 2d at 489.

It is clear from *Martinez* that, in order to demonstrate a violation of the Fourteenth Amendment and, hence, §1983

liability, there must exist a very close, direct causal nexus between the conduct complained of and the alleged deprivation. It is equally clear that the constitutionally required causation does not necessarily track the state law tort concept of causation. Again, in this case, the required causal connection has not been shown. There is simply nothing in the record to suggest that either appellant, or any state official, took or even lost respondent's hobby kit. Quite conceivably, the kit may have been taken by another inmate and converted to his own use. Accordingly, the mere fact that inadvertence on the part of appellants may have permitted the occurrence of an occasion for the taking or loss of the property is insufficient to establish a deprivation of property within the intendment of the Fourteenth Amendment. See *Bonner* v. *Coughlin,* 545 F. 2d 565 (7th Cir. 1976) (no state action where prison official's failure to close cell door permitted the subsequent loss of trial transcript).

Just as the lack of requisite causal connection precludes a §1983 cause of action based upon violation of the Fourteenth Amendment here, so also does the absence of a level of culpability on the part of appellants exceeding simple negligence. Separate from any additional qualification §1983 may on its own impose, the state of mind or degree of fault of a defendant state official is relevant in determining whether a constitutional deprivation has occurred. See *Baker, supra.* Although this Court has not directly addressed the question in reference to claimed deprivations under the Due Process Clause of the Fourteenth Amendment and §1983, it has in other areas not hesitated to impose a requirement of intentional conduct as a condition necessary for the occurrence of a contitutional violation. See, *e.g., Estelle* v. *Gamble,* 429 U.S. 97 (1976) (no violation of Eighth Amendment unless deliberate indifference

to serious medical needs of inmate demonstrated); *Washington* v. *Davis,* 426 U.S. 229 (1976) (in absence of racially discriminatory purpose, statute having racially disproportionate impact not unconstitutional). Even in a case involving §1983 and the Fourteenth Amendment's Due Process Clause, though not deciding it on degree of fault, this Court recognized the concerns involved in permitting the establishment of a constitutional deprivation on a showing of simple negligence. In *Paul* v. *Davis,* 424 U.S. 693 (1976), in which the plaintiff contended the posting of his name among those of known shoplifters violated the Fourteenth Amendment, the Court first questioned why, if there were a violation under such circumstances, there could not also be a violation where a government vehicle negligently driven by a sheriff struck and killed a pedestrian, and then stated:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result. . . ." *Id.,* at 698-699.
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> "But [respondent's] reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Id.,* at 701.

The manifest implication of cases such as *Estelle* v. *Gamble, Washington* v. *Davis* and *Paul* v. *Davis* is that, in order

to establish a violation of the Fourteenth Amendment Due Process Clause, the party claiming same must show more than mere negligence on the part of the state official.

Arguing strongly in favor of, if not mandating, such a conclusion is the common purpose of the Fourteenth Amendment and §1983, the legislative measure to enforce that amendment. There can be no doubt but that that purpose is to prevent and remedy abuse of official position —the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." See *United States* v. *Classic,* 313 U.S. 229, 326 (1941); *Monroe* v. *Pape,* 365 U.S. 171 (1961). The term "abuse" or "misuse" connotes intentional conduct on the part of the actor. Hence, it is appropriate that intentional conduct suffice to establish a violation of the Due Process Clause and §1983. Simple negligence, however, implies no more than inadvertence or mistake caused by heedlessness or carelessness in the face of a risk which the reasonable person would not take. See Prosser, *The Law of Torts,* §31 (4th ed. 1971). As it does not implicate the concept of abuse, it would further no purpose of the Fourteenth Amendment or §1983 to permit a cause of action which charges a state officer only with negligence. Therefore, respondent's claim of unconstitutional deprivation of property, being premised upon appellants' alleged simple negligence, must fail.

POINT II

Even if, arguendo, state prison officials may be held liable for money damages for mere simple negligence involved in the loss or damage of inmate property, the inmate property herein valued at $23.50 is de minimis, and its loss should not invoke the protections of the Fourteenth Amendment.

This Court has indicated that the general rule which requires some form of notice and hearing before deprivation of a property interest would not be applicable in situations where the property interest involved can be characterized as de minimis. *Fuentes* v. *Shevin,* 407 U.S. 67, 90 n.21 (1972); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

The maxim "De minimis non curat lex", meaning "The law does not care for small things", states a well-recognized principle and is generally used when very small errors are urged. "De minimis" in the law has always been taken to mean trifles—matters of a few dollars or less. 26A *C.J.S. De Minimis,* p. 175. Under the doctrine, a court of original jurisdiction may refuse to take jurisdiction of an action based upon a wrong which constitutes only a trifling invasion of the plaintiff's rights or results only in trifling damage. 1 *Am.Jur.2d Actions,* §67. In *Goulding* v. *Farrell,* 106 Minn. 44, 117 N.W. 1046 (Sup.Ct. 1908), the court held that the basis of the maxim is that mere trifles or technicalities must yield to practical common sense and substantial justice. See also, generally, *Annotation, "De Minimis Non Curat Lex",* 44 A.L.R. 168 (1926) indicating that the maxim operates in courts of law only in cases where no right other than to recover money is involved, and that a "trifle" is a relative term, depending upon circumstances and, in some degree, the amount involved in the suit.

The Circuit Courts have taken conflicting positions as to the applicability of the de minimis doctrine in state prisoner §1983 civil rights litigation against their keepers. Some courts have applied the doctrine, *e.g., Northern* v. *Nelson,* 448 F.2d 1266 (9th Cir. 1971) (involving seven copies of the newspaper "Muhammad Speaks" worth $1.05), *Nickens* v. *White,* 536 F.2d 802 (8th Cir. 1976) (involving a catalog of office supplies); *Pitts* v. *Griffin,* 518 F.2d 72 (8th Cir. 1975) (involving one F.M. radio); *Howard* v. *Swenson,* 426 F.2d 277 (8th Cir. 1970), *cert. den.* 400 U.S. 948 (1970) (several pairs of civilian shoes); *Lingo* v. *Boone,* 402 F.Supp. 768 (N.D.Cal. 1975) (withholding a newsletter).

Other courts have refused to apply the doctrine *Ferranti* v. *Moran,* 618 F.2d 888 (1st Cir. 1980) (destruction of a radio); *Bonner* v. *Coughlin,* 517 F.2d 1311, 1314 (7th Cir. 1975) (a trial transcript of "limited and uncertain monetary value"); *Carroll* v. *Sielaff,* 514 F.2d 415 (7th Cir. 1975) (involving a typewriter and currency). The Third Circuit, in particular, refused to invoke the doctrine in, and reversed a trial court's dismissal of, a prisoner's civil rights action against a guard arising out of the latter's confiscation of a mere seven packages of cigarettes. *Russell* v. *Bodner,* 489 F.2d 280 (3rd Cir. 1973).*

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* In his separate opinion, Judge Adams stated that although he concurred that de minimis should not be invoked, he found the result perplexing and not satisfactorily explainable:

> "I am constrained to concur in the result reached by the Court in this case, and do so solely on the ground that the complaint sufficiently states a section 1983 cause of action to survive a motion to dismiss. Having been reluctantly persuaded that the ancient maxim 'de minimis non curat lex' does not apply to civil rights actions such as the one

(Footnote continued on following page)

As indicated previously, inmates in the New Jersey prison system are permitted to keep and use numerous personal items and belongings. They file a large volume of claims for the alleged loss or damages of such personalty, including approximately 110 claims per year at the Trenton Prison alone. The Department of Corrections, after investigation, has been approving and paying claims filed by the inmates of the State's seven major institutions in approximately 100 cases a year, and such claims for the most part are for sums less than $30, and as small as $1.19.

Unless this Court reverses the decision reached herein, every penal administrator in America will be faced with the future prospect of civil liability for all loss or damage to inmate property which may result from simple negligence. It is not unrealistic to predict that such a result will cause a shift from inmate usage of the state prison administrative claims system to inmate filings of Sec. 1983 civil rights litigation in the United States District Courts in even greather volume than occurs today. Based on the

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(Footnote continued from preceding page)

presented here, it is my view that this Court has no choice but to conclude that the district court erred in dismissing the complaint as frivolous.

This result may well be expected to come as a surprise to the district judge who dismissed the complaint. It will also no doubt generate a certain amount of disbelief in those taxpayers and citizens generally, not to mention judges and lawyers, who will ask how federal courts have come to be concerned with a case in which a state prisoner alleges simply that his constitutional rights were violated when a prison guard took seven packages of cigarettes from him. I have yet to answer this question satisfactorily for myself" (489 F.2d at 281-282).

New Jersey experience, it is not unreasonable to anticipate and project that this infusion of significantly greater inmate §1983 litigation will merely serve to further burden the federal court system and the prison administrators. Even if, arguendo, state prison officials may be held liable for money damages for purely simple negligence involved in the loss or damage to inmate property, it is strongly urged that the Court, at the very least, should exercise its discretion and rule that in cases involving inmate property with very small monetary values, the Courts should not reject, but follow, the de minimis rule.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below upholding an award of money damages against the state prison authorities under the Civil Rights Act is erroneous and therefore should be reversed.

Respectfully submitted,

JOHN J. DEGNAN
Attorney General of New Jersey
Attorney for the State of New Jersey as Amicus Curiae.

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

JOSEPH T. MALONEY,
GEORGE W. FISHER, JR.,
Deputy Attorneys General,
On the Brief.